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No. 08-

IN THE

Supreme Court of the United States

5634 EAST HILLSBOROUGH AVENUE, INC., d/b/a "TOOTSIES"; GEMINI PROPERTY VENTURES, LLC, d/b/a "SHOWGIRLS"; SHOWGIRLS MENS CLUBS, INC., d/b/a "SHOWGIRLS"; 3630 CORPORATION, INC., d/b/a "4-PLAY VIDEOS III"; PLEASURES VIDEO, INC., d/b/a "PLEASURES I"; and PLANET X SUPER CENTER, INC., d/b/a "PLANET X,"

Petitioners,

v

HILLSBOROUGH COUNTY, FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the opinion of the Eleventh Circuit below, and the other judicial opinions throughout the Nation that have misinterpreted or misapplied the decision in *City of Los Angeles v. Alameda Books, Inc.*, 525 U.S. 425 (2002), operated as a denial of due process by depriving a party the right in a dispute, constitutional or otherwise, to put on ***evidence*** addressing the truth or falsity of a fact in dispute?

2. Does the confusion in the application of the burden shifting evidentiary process set forth in *City of Los Angeles v. Alameda Books, Inc.*, 525 U.S. 425 (2002), justify certiorari review?

3. Can the Courts apply a differential summary judgment standard and evaluate countervailing evidence and testimony at the summary judgment stage in upholding regulations affecting a First Amendment protected form of business, and deny due process in this one isolated context?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners state that there is no parent or publicly held company having any ownership interest in the corporations.

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at *5634 E. Hillsborough Ave., Inc. v. Hillsborough County, Fla.*, 294 Fed.Appx. 435 (11th Cir. 2008). The opinion of the United States District Court for the Middle District of Florida is reported at *5634 E. Hillsborough Ave., Inc. v. Hillsborough County, Fla.*, 2007 WL 2936211 (M.D. Fla. 2007).

STATEMENT OF JURISDICTION

The Eleventh Circuit's opinion, affirming the District Court's order granting summary judgment in favor of Respondent, was rendered September 18, 2008. A timely petition for rehearing and rehearing en banc was denied on November 13, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment 1

> Congress shall make no law. . .abridging the freedom of speech. . . .

United States Constitution, Amendment 14

> Section 1. . . .nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rules of Civil Procedure, Rule 56

(c) Serving the Motion; Proceedings. . . . The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

Hillsborough County, Florida Ordinances

Ordinance 06-24—This Ordinance imposes zoning restrictions on "sexually oriented businesses" purportedly on the basis of several "Whereas" clauses, and a section of "rationale and findings" that was the subject of evidentiary challenges below. These components of the Ordinance are adopted in Ordinance 06-25 and are omitted from the Appendix for brevity. Section 2.02.06 and the actual restrictions appear at Appendix 28a.

Ordinance 06-25—This Ordinance imposes licensing, regulatory and administrative process restrictions on "sexually oriented businesses" purportedly on the basis of several "Whereas" clauses, and a section of "rationale and findings" that was the subject of evidentiary challenges below. The relevant sections of this Ordinance appear at Appendix 30a.

Ordinance 06-26- This Ordinance imposes the restrictions of Ordinances 06-24 and 06-25 by adding "bikini bars" to the list of "sexually oriented businesses" purportedly on the basis of several "Whereas" clauses, and a section of "rationale and findings" that was the subject of evidentiary challenges below. The relevant sections of this Ordinance appear at Appendix 55a.

STATEMENT OF THE CASE

Petitioners, a number of licensed "adult oriented" businesses and other businesses not previously defined as "adult oriented" that were targeted by the adoption of County Legislation, filed what ultimately became consolidated actions against questionably motivated legislation adopted by Hillsborough County, Florida on September 7, 2006. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 2201, Rule 65 of the Federal Rules of Civil Procedure, 42 U.S.C. § 1983, 42 U.S.C. § 1985, 42 U.S.C. § 1988, the First, Fifth, and Fourteenth Amendments to the Constitution of the United States, Article I Section 10 of the Constitution of the United States, and supplemental state law claims were brought pursuant to 28 U.S.C. § 1367. The challenges alleged that the legislation was retaliatory, unnecessary, and unsupported by any valid legislative predicate, ultimately destroying the ability to operate the subject businesses and destroying First Amendment and business property rights in the process. Prior to any trial on the merits, on October 4, 2007, the United States District Court for the Middle District of Florida, Tampa Division, granted Summary Judgment to

Hillsborough County with respect to all challenges to the County legislation. An appeal was filed on December 10, 2007, with the Eleventh Circuit Court of Appeals, which affirmed the summary judgment on September 18, 2008. A motion for rehearing and rehearing en banc was filed on October 8, 2008, both of which were denied on November 13, 2008.

The nature of this petition goes to the heart of the American judicial system's steadfast policy of ensuring the right of any party in a dispute, constitutional or otherwise, to put on ***evidence*** addressing the truth or falsity of a fact in dispute. Simply stated, the three challenged ordinances, Ordinances 06-24, 06-25, and 06-26, were adopted by Hillsborough County on September 7, 2006. They were challenged through the filing of two separate actions, the first by alcoholic beverage establishments featuring entertainment provided by Bikini clad females that, prior to the adoption of Ordinance 06-26, were ***not*** considered adult entertainment, and the second action was filed by properly zoned and licensed adult bookstores, operating in full compliance with the extensive adult entertainment regulations already in place in the County Code.

In challenging the legislation, the common argument was that the operation of the subject businesses did not cause any disproportionate secondary effects within the County, did not cause any decrease in property values, any increase in criminal activity, the acceleration of urban blight, or any detrimental impact on the citizens of Hillsborough County. The Petitioners, and many other concerned citizens, compiled vast

amounts of studies, data and evidence and presented it directly to the County Commission, both prior to and during the August and September 2006 public hearings held. This data included extensive reviews of the flawed methodology of the "studies" relied upon by the County, as well as extensive "local studies" showing that, according to the records maintained by the County's own law enforcement agencies, the businesses at issue did not exhibit any adverse impact by causing crime. The County also included a significant amount of data, and the primary experts and opinion witnesses, both supporting and opposing the legislation, provided testimony directly to the County Commission during those public hearings.

These materials, both extensive and very voluminous, were stipulated by letter agreement between the parties to comprise the "Rule 26" Expert Reports. It was these materials, including the documents filed and transcripts of the August 2, August 16, and September 7, 2006, public hearings, as well as excerpts of subsequent depositions and other zoning and evidentiary affidavits and documents (a variety of maps purportedly showing the areas available for the establishment of adult businesses not made available at the time of the adoption of the zoning legislation, Ordinance 06-24) that were filed in support of the Motion for Summary Judgment filed by the County on August 15, 2007. The vast number of documents was included in District Court Docs. 35, 36, 37, 38, 39, 40, 41, and 42, 8:06-cv-01695-RAL-EAJ.

The Petitioners filed their Response in Opposition to Motion for Summary Judgment on September 10,

2007. In addition, as supplementation to earlier reports submitted by Petitioners' witnesses during the public hearings approximately one year earlier, and in response to alleged misstatements and inaccuracies in statements attributed to these expert witnesses, on September 10, 2007, Petitioners filed affidavits from a number of experts. These included Criminologist, Terry Danner, Ph.D., (providing 25 separate studies showing that adult businesses extensively studied were not "uniquely criminogenic"), Research Scientist, Randy Fisher, Ph.D., (opining on the total lack of proper research methodology used in the production of the vast majority of the government produced materials), Anthropologist, Judith Hanna, Ph.D., (opining that the conduct restrictions contained in the challenged legislation had a detrimental impact on the communicative value of dancer's performances), and Richard Schauseil (opining on the lack of any adverse impact on real estate values caused by adult entertainment businesses). Even though these materials were simply supplemental to the same extensive data establishing the same points from the same witnesses, the County thereafter filed a Motion to Strike these supplemental responsive affidavits, amended to comply with the Middle District Local Rules.

On October 4, 2007, the District Court issued an Order granting the Motion for Summary Judgment, dismissed as moot the County's Motion to Strike Affidavits, and entered judgment in favor of the County. A companion Order and Judgment was entered in the consolidated administratively closed action. The Order, identical in both cases, sets forth an accurate description of the historical background of the adoption of the challenged legislation, the "findings and rationale" set

forth, and summarized the thousands of pages of evidence and testimony submitted by the parties as, "The experts for the Plaintiffs opined that the crime associated with sexually oriented businesses was not more prevalent in the areas where they are located, contrary to the reports provided by the experts retained by the County."

Unfortunately for the Petitioners, while the instant action was pending before the District Court, the Eleventh Circuit issued its decision in *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (11th Cir. 2007), which became final upon the issuance of the mandate on September 17, 2007, seventeen (17) days before the order granting Summary Judgment was issued. The *Daytona Grand* decision weighed heavily in the comments made by the District Court, allowing the consideration of "anecdotal" over empirical evidence, and, ultimately conceding that the Court *weighed* the disputed evidence to conclude:

> "Once the County relied on evidence it reasonably believed to be relevant to the problem of adverse secondary effects, the burden then shifted to the Plaintiffs to "cast direct doubt" on the County's reasoning. This cannot be accomplished, however, by simply providing reports and testimony reaching a contrary conclusion such as those prepared and given by Drs. Danner, Fisher, and Hanna, and Mr. Schauseil, all experts retained by the Plaintiffs. *Daytona Grand* made it clear that given the existence of different conclusions based on studies, either empirical or

> anecdotal, the Court may not substitute its judgment for the Board. . .Even assuming the Plaintiffs' position for its rationale is also considered to be plausible and reasonable, this Court, as noted, cannot substitute its judgement for that of the Board."

Believing that the Order was a complete departure from the concept of judicial review, due process and the rules of evidence, Petitioners filed their Notice of Appeal for both consolidated actions on October 16, 2007. The County thereafter filed a Notice of Appeal of the District Court's consideration of the supplemental responsive affidavits. These appeals proceeded independently.

Oral argument was entertained by the 11th Cir. Panel on September 9, 2008, and the opinion affirming the District Court's granting of summary judgment was entered on September 18, 2008. The Panel affirmed the District Court's grant of summary judgment, apparently overlooking, in a highly critical opinion, the existence of extensive evidence in the record challenging both the methodology and quality of "outdated and foreign studies" purportedly relied on by the County to support the adoption of the challenged legislation, as well as erroneously evaluating the weight of the evidence presented by Petitioners. A motion for rehearing and rehearing en banc was filed on October 8, 2008, both of which were denied on November 13, 2008.

REASONS FOR GRANTING THE PETITION

I. The Important First Amendment Implications of This Petition

This case presents an important and critical question regarding issues that have both confused and tortured courts at every level of state and federal judiciaries, both before and, troublingly, *after* this Court's divided decision in *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 438, 152 L. Ed. 2d 670, 122 S. Ct. 1728 (2002). This confusion has emanated from the first true articulation of the "burden shifting" evidentiary process to deal with challenges to "shoddy data and evidence" so often used by governmental bodies to support legislation that is seldom based on any actual concern for "secondary effects," but more often the product of objections to the "content" of the expression.

This Court is being called upon to provide guidance and specificity as to what ***analytical framework*** and type of ***evidentiary burden*** must be utilized in evaluating challenges to adult entertainment legislation. Since this legislation directly impinges on the exercise of fundamental First Amendment rights and imposes regulatory and operational restrictions that, under the guise of being adopted to address the alleged "adverse secondary effects" purportedly caused by the adult businesses sought to be regulated, often results in the annihilation of those businesses, this petition seeks to eliminate the practice of countless courts in "picking and choosing" isolated language from the *Alameda Books* decision to support totally inconsistent and irreconcilable approaches to the "burden shifting" analysis articulated therein.

This case is about one of the most precious aspects of the First Amendment: at what point can the government impose "censorship under the guise of legislation." This goes to the core fundamental right of citizens to choose what type of entertainment they wish to partake of without unjustified governmental interference or the total elimination of First Amendment freedoms. Petitioners urge the acceptance of the instant Petition for review and clarification because it satisfies each of the factors identified in Rule 10 that guide this Court's decisions as to whether or not to grant certiorari review.

The decision of the 11th Circuit, in addition to being a manifest denial of Petitioners' due process rights by failing to allow Petitioners to fully litigate their claims because of erroneous "factual determinations" is in direct and irreconcilable ***conflict with decisions of this Court***. The questions presented identify a critical ***conflict among the federal circuits***, and both state and federal courts across the Nation have cried out for clarification of the Byzantine framework that this Court's recent divided decisions on adult entertainment legislation have created, even if unintentionally.

Of equal importance, the 11th Circuit decided a ***significant question of federal law,*** arising under the Free Speech Clause of the First Amendment which has been interpreted in different ways by multiple state and federal courts. This has resulted in a critical issue that has not been clearly settled by this Court, and cries out for resolution. All of this has been brought about by differing and irreconcilable opinions arising from the various courts dealing with the issue initially addressed in the Alameda Books decision.

It is of the utmost constitutional importance that this Court grants this Petition. The First Amendment is concrete evidence of our "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Unfortunately, in virtually every level of the judiciary today, and robustly evident throughout the Federal Circuits misconstruing or attempting to "fill in the blanks" of this Court's prior adult entertainment decisions, the right to Free Speech is in extreme peril. If censorship, achieved through the imposition of regulations that infringe on the lawful operation of businesses dealing with controversial themes, can occur with ***no clear burden*** on the government to prove any governmental interest served by that censorship, freedom is lost.

This case involves nothing less important than the First Amendment, and the decision sought to be reviewed in this Court, as set forth below, is worthy of consideration, if for no other reason than the confusion in this area of the law repeatedly complained of by virtually every court trying to fairly and consistently apply the Rule of Law to these critical First Amendment issues.

II. The Rejection of "The Rules Of Evidence" In Adult Entertainment Cases Is In Direct Conflict With This Court's Decision In *City of Los Angeles v. Alameda Books* And Further Aggravates The Existing Split Of Authority And Confusion Interpreting That Decision

The 11th Circuit, in affirming the grant of summary judgment issued by the District Court, incorrectly overlooked this Court's precedent and Eleventh Circuit precedent which allow a full and fair opportunity to evaluate conflicting evidence, in an appropriate *evidentiary hearing*, relative to the hypothesis that adult entertainment businesses create "adverse secondary effects."[1] The critical issue in this argument

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[1] It must be acknowledged that there are peer-reviewed articles and judicial opinions which establish the fact that adult businesses do not invariably cause adverse secondary effects. *See, e.g., Peek-A-Boo Lounge,* 337 F.3d at 1268; *Flanigan's Enterprises,* 242 F.3d at 986; and *Erie Boulevard Triangle Corp. v. City of Schenectady,* 250 F.Supp.2d 22, 32 (N.D.N.Y. 2003); Daniel Linz, Bryant Paul, Kenneth C. Land, Jay R. Williams & Michael E. Ezell, *An Examination of the Assumption That Adult Businesses Are Associated With Crime In Surrounding Areas: A Secondary Effects Study In Charlotte, North Carolina,* 38 Law & Society Review, No. 1 (2004); Daniel Linz, Bryant Paul & Mike Z. Yao, *Peep Show Establishments, Police Activity, Public Place and Time: A Study of Secondary Effects in San Diego, California,* 43 The Journal of Sex Research 182 (2006); Daniel Linz, Mike Z. Yao & Sahara Byrne, *Testing Supreme Court Assumptions in California v. LaRue: Is There Justification for Prohibiting Sexually Explicit Messages in Establishments that Sell Liquor?,* 7 Communication Law Review, 23-53 (2007); and Roger Enriquez, Jeffrey M. Cancino & Sean P. Varano, *A Legal*

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is that ordinances which purport to regulate any form of "adult-entertainment" are unconstitutionally "content based" unless it can be shown that any challenged legislation is designed to target the so called "secondary effects" of adult businesses. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976); *City of Renton v. Playtime Theaters Inc.*, 475 U.S. 41 (1986).

It was in *Renton* where the concept of "evidence" was deemed necessary to support such legislation. Indeed, in upholding the ordinance at issue in *Renton*, this Court held that, "the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities so long as whatever ***evidence*** the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 53, 106 S.Ct. 925, 931 (1986) (emphasis added). This concept was later modified by *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) and *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002), which first identified the right of a party to challenge the evidence relied upon by a local government in the adoption of such legislation, and then created a "burden shifting" in the evaluation of such evidence if the

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and Empirical Perspective of Crime and Adult Establishments: A Secondary Effects Study in San Antonio, Texas, 15 Am. U.J. Gender Soc. Pol'y & L. 1 (2006) (non-peer reviewed published study that found no connection between crime rates and live entertainment "adult" businesses).

challenging party could "cast doubt" on the evidence relied upon by the government. Critical to this action, it must be stressed that no party challenging such legislation had to *prove* that the government's evidence was wholly invalid, or *prove* that the affected businesses had to win the case, they simply had to "cast doubt" on the challenged evidence.

In the instant action, the 11th Circuit simply ignored the vast evidence submitted to "cast doubt" on the County's evidence, and erroneously ignored the challenge to the core methodology, applicability, and quality of the County's evidence. The "purpose and effect of suppressing secondary effects" is meaningless, if the ***evidence*** relied on by the County is scientifically and/or methodologically flawed, and thus ***unreasonable*** to rely on. Simply stated, the Panel decision eviscerates the "intermediate scrutiny" found to be the appropriate level of analysis for such legislation, as stated in *Erie*, *Alameda Books*, and every Eleventh Circuit case dealing with challenges to adult entertainment legislation,[2] reducing the scrutiny to a level lower than "rational basis," a level totally unacceptable in the context of First Amendment protected expression. In that the Petitioners challenged the very evidence relied upon by the County (clearly utilizing the test set forth in *United*

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[2] *Flanigan's Enterprises, Inc. v. Fulton County, Georgia.*, 242 F.3d 976 (11th Cir. 2001); *Zibtluda, LLC v. Gwinnett County*, 411 F.3d 1278 (11th Cir. 2005); *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301 (11th Cir. 2003); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Florida*, 337 F.3d 1251 (11th Cir. 2003)

States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673 (1968), contrary to Panel criticism), it is obvious they ***did*** challenge whether the ordinances were designed to serve a substantial governmental interest, as well as every other ***reasonable*** application of the legislation.

III. The Failure of The 11th Circuit to Adhere To The *Alameda Books* Decision and The Evidentiary Standard Articulated Therein Shows Even More Conflict Among Circuit Courts and Their View Of the "Shifting Burdens" Established in That Decision

The 11th Circuit, in affirming the grant of summary judgment issued by the District Court, incorrectly overlooked unequivocal decisions from this Court which establish standards related to "genuine issues of material fact," by constructively creating a "super-burden" to establish such "genuine issues" in the context of challenges to legislation restricting First Amendment protected adult entertainment businesses.

Under this Court's clear precedent:

> "Judgment in favor of a party is proper where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party on the issue before the Court." Fed. R. Civ. P. 56.
>
> "Plaintiffs' evidence must be significantly probative to support their claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49

> (1986)." This articulates the standard also established in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The Eleventh Circuit has also adopted that standard, articulating a clear embrace of a party's right to have disputed facts tried under proper evidentiary standards. *Felder v. Howerton*, 240 Fed. Appx. 404, 406 (11th Cir. 2007); *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739 (11th Cir. 1996). In the instant action, both the District Court and the 11th Circuit engaged in weighing the vast amounts of countervailing evidence that, at the very least "cast doubt" on the methodology, quality, and applicability of the County's outdated, foreign studies.

Ultimately, the 11th Circuit, clearly underscoring the conflict among the Circuit Courts dealing with these evidentiary issues, created some kind of "super-burden" for adult entertainment businesses to establish "genuine issues" in the context of challenges to legislation restricting such First Amendment protected businesses. Essentially, the 11th Circuit's opinion would require adversely affected parties to *prove* that "the particular businesses of appellants had not caused such secondary effects," prior to any actual trial. This improper weighing of evidence is the direct result of this Court's failure to reconcile the endless conflict caused by misinterpretations of the Alameda Books decision.

The confusion over applying the *Alameda Books* case and the apparently "optional" and sporadic allowance of any proper evidentiary analysis of the

"burden shifting" procedure articulated in that case has been repeatedly complained about by many courts. For example, one court articulated the problem as follows:

> "[This]. . .presents an issue that has ***often been litigated in the courts of this nation***: when and to what extent may the government regulate an adult use. . .***[R]esolution of this issue is complicated by court's inability to articulate a clear set of principles to govern cases such as these.***"[3]

Through this action, Petitioner seeks to have this Court establish an unequivocally ***"clear set of principles,"*** and to establish an appropriate evidentiary framework for the courts, not only in the 11th Circuit, but in every other court in the Country that must deal with these issues. This Court should grant the petition and craft a workable framework where some modicums of the rules of evidence are applied to "secondary effects" challenges. Petitioner clearly seeks a way to ensure that all courts apply ***consistently*** and with ***precision*** a minimum of evidentiary fairness in this controversial, frequently litigated, but critical area of Free Speech. This is required by the barest modicums of both the equal protection doctrine and substantive due process. Petitioners also urge this Court to grant review to reconcile the monumental conflict between the Federal Circuit Courts in their application of *Alameda Books*, and its state and Federal progeny, and seek a

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[3] *XLP Corp. v. Lake County*, 359 Ill. App. 3d 239, 832 N.E.2d 480 (Ill. App. 2d Dist. 2005).

day when such evidentiary evaluations will be constitutionally consistent.[4]

Unfortunately, despite this Court's best attempts, the state of the law is in chaos. More than one court has complained that guidance from this Court on this issue has been somewhat less than clear, and the courts have complained that they must begin their analysis by

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[4] Several Circuit Court decisions and various state court decisions have made similar impassioned pleas for this Court to address the inconsistencies and confusion exhibited by the several attempts to apply the *Alameda Books* decision consistently, said pleas coming from both the affected businesses and local governmental entities. *See Abilene Retail No. 30, Inc. v. Board of Commissioners of Dickinson County, Kan.*, 492 F.3d 1164 (10th Cir. 2007), *cert. den.*, 128 S.Ct. 1762 (2008); *City of Chicago v. Pooh Bah Enterprises, Inc.*, 224 Ill.2d 390 (Ill. 2006), *cert. den.*, 128 S.Ct. 127 (2007); *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (11th Cir. 2007), *cert. den.* 128 S.Ct. 1246 (2008); *Deja Vu of Nashville, Inc. v. Metropolitan Gov. of Nashville and Davidson County, Tenn.*, 274 F.3d 377 (6th Cir. 2001), *cert. den.*, 122 S.Ct. 1952 (2002); *Deja Vu of Nashville, Inc. v. Metropolitan Gov. of Nashville and Davidson County, Tenn.*, 466 F.3d 391 (6th Cir. 2006), *cert. den.*, 127 S.Ct. 2088 (2007); *Encore Videos, Inc. v. City of Antonio*, 330 F. 3d 288 (5th Cir. 2003), *cert. den.*, 124 S.Ct. 466 (2003); *G.M. Enterprises v. Town of St. Joseph, Wisconsin*, 350 F.3d 631 (7th Cir. 2003), *cert. den.*, 125 S.Ct. 49 (2004); *H and A Land Corp. v. City of Kennedale, Tex.*, 480 F.3d 336 (5th Cir. 2007), *cert. den.*, 128 S.Ct. 196 (2007); *Ice Embassy, Inc. v. City of Houston*, 236 Fed.Appx. 118 (5th Cir. 2007), *cert. den.*, 128 S.Ct. 1658 (2008); *Kentucky v. Jameson*, 215 S.W.3d 9 (Ky. 2006), *cert. den.*, 128 S.Ct. 190 (2007); *Kismet Investors, Inc. v. County of Benton*, 617 N.W.2d 85 (Minn. App. 2000), *cert. den.*, 122 S.Ct. 2356 (2002); *S.O.B., Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003), *cert. den.*, 124 S.Ct. 104 (2003).

setting forth the law in the best fashion they can from applicable precedent, noting that doing so is very difficult. Many courts are virtually crying out, almost directly, for the necessity of this Court to enunciate a clear evidentiary standard, eliminating any question, and eliminating any "nebulous state of the case law" that would interfere with the consistent and properly guided evaluation of similar issues by the courts everywhere these issues frequently arise. If the number of cases where identical concerns are articulated does not inspire this Court to accept review of this matter, then countless courts will be inevitably destined to evaluate similar challenges regarding the critical issues presented by the instant action, and relegated to the same evidentiary chaos that has resulted from either an inability or a flat refusal to properly apply *Alameda Books*, all at a grave cost, not only to liberty, but to the preservation of the Rule of Law. It is respectfully requested that this Court grant this Petition.

From a historical perspective, this Court has consistently shown a desire to protect the First Amendment, even, and sometimes particularly, in areas of great controversy. As this Court has stated, there is a presumption that any governmental restraint on expressive conduct is impermissible. *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 95 S. Ct. 1239 (1975). The *Alameda Books* decision and the articulation of the "burden shifting" procedures articulated therein, was not entirely unprecedented. Early on, ***simply applying the rules of evidence***, this Court held that, once a party demonstrates that a regulation deprives it of protected freedom of expression, the burden shifts to the governing body to justify that infringement.

See Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 803, 104 S. Ct. 2118 (1975). To address the issue from its most basic starting point, any form of legislation restricting any businesses deemed to be "adult entertainment" must be analyzed under the First Amendment. *Barnes v. Glen Theatre*, 501 U.S. 560 (1991); *Redner v. Dean*, 29 F. 3d 1495 (11th Cir. 1994), *cert. den.*, 115 S.Ct. 1697 (1995).

From the earliest decisions dealing with the regulation of adult entertainment businesses, it was established that the legislation at issue could only be justified if it regulated or addressed a legitimate governmental interest, established by *evidence* showing the existence of problems that would be favorably addressed by the legislation, to prevent the so-called "adverse secondary effects" *shown to exist*, that were allegedly engendered by adult entertainment establishments. *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *Renton, supra.* A requirement of this concept was that the existence of these adverse secondary effects be *established* through competent, substantial evidence. *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985); *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982). *Alameda Books* was not the first case to identify this fundamental requirement. Under the clear mandates of the law articulated in *Alameda Books*, it is a fundamental concept of statutory construction to make sure that the restrictions imposed by legislation are actually supported by the evidence trying to establish the existence of an otherwise unremediated governmental interest. *See Basiardanes v. City of Galveston*, 682 F2d

1203, 1213 (5th Cir. 1982). Every Ordinance requires the Court:

> ". . .To examine the strength and legitimacy of the governmental interest behind the ordinances and the precision with which the ordinance is drawn. Unless the ordinance ***advances*** significant governmental interests and ***accomplishes*** such advancement without undue restraint of speech, the ordinance is invalid." *Basiardanes* at 1214, citing *Schad v. Borough of Mt. Ephraim,* 101 S.Ct. at 2183-2184. (Emphasis added).

Unfortunately, there are scores of decisions that are based on an entirely different understanding of the required evidentiary burdens. These decisions that have essentially ignored the presentation of unassailable *evidence* "casting doubt" on the findings upon which various adult use restrictions have been based, include: *G.M. Enterprises v. Town of St. Joseph, Wisconsin*, 350 F.3d 631 (7th Cir. 2003); *Worldwide Video of Washington, Inc. v. City of Spokane,* 368 F.3d 1186 (9th Cir. 2004); *Center for Fair Public Policy v. Maricopa County, Arizona*, 336 F.3d 1153 (9th Cir. 2003); *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F.Supp.2d 672 (W.D. Kentucky 2002); *Heideman v. South Salt Lake City,* 348 F.3d 1182 (10th Cir. 2003); *Ben's Bar v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003); *S.O.B., Inc. v. County of Benton,* 317 F.3d 856 (8th Cir. 2003); *N.W. Enterprises v. City of Houston,* 352 F.3d 162 (5th Cir. 2003); *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002); *Fantasy Ranch, Inc. v. City of Arlington*, 2004 WL 1779014 (N.D. Texas

2004); and *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546 (5th Cir. 2006). These cases represent just a sample of how various courts, attempting to apply *Alameda Books*, have completely misapplied any evaluation of evidentiary "challenges."

Emphasizing this enormous and irreconcilable conflict, there are ***scores of other decisions misconstruing*** *Alameda Books*, and this is a problem of huge constitutional significance, underscored by those decisions that actually show an understanding of *Alameda Books*, and allow the ***rules*** of evidence to be utilized in evaluating countervailing ***evidence*** and invalidating unsupported legislation, when justified by a proper evaluation of ***the truth***. Of the cases that "get it right," the clearest is *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County, Florida*, 337 F.3d 1251 (11th Cir. 2003), another case where the court complains that any assessment of evidence is difficult, "because of the large number of no-clear-majority decisions of the Court in cases of this type. . . ." *Id.* at 1254.

The other decisions showing a split among virtually every level of the judiciary, and specifically among the federal circuit courts include:

Dima v. High Forest Township, 2003 WL 21909571 (D.Minn. 2003)

> (". . . *Alameda Books* certainly clarifies the manner in which the Court should determine whether the municipality relied on evidence that was 'reasonably believed to be

> relevantfor demonstrating a connection between speech and a substantial, independent governmental interest.' *Alameda Books*, 535 U.S. at 438. Here, under the standard set forth in *Alameda Books*, the court found that genuine issues of fact existed as to whether High Forest Township was reasonable in relying upon the studies that provided the rationale for its ordinance. Primarily, it found persuasive that the studies relied upon by High Forest Township were conducted in metropolitan, not rural, areas, and the studies did not particularly examine the secondary effects of purely take-home fare. In addition, some of the studies were more than 25 years old.");

Dima v. High Forest Township, 2003 WL 22736561 (D.Minn. 2003)

("These ambiguous reports of negative perceptions, however, are not sufficient to meet the City's burden. . .the additional studies provided by High Forest Township still do not survive the scrutiny of *Alameda Books.*").

Encore Videos v. City of San Antonio, 330 F.3d 288 (5th Cir. 2003)

> ("The city justifies this ordinance on the ground that it will reduce the adverse secondary effects [such as increased crime and the reduction of property values] of sexually oriented businesses. Therefore, in

> order to demonstrate that the ordinance is narrowly tailored, the city must show that the ordinance addresses these problems.")

R.V.S v. City of Rockford, 361 F.3d 402 (7th Cir. 2004)

> ("At this stage, courts are required to ask 'whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance.' *Ben's Bar*, 316 F.3d at 724 [quoting *Alameda Books*, 535 U.S. at 441, 122 S.Ct. 1728]. In other words, simply stating that an ordinance is designed to combat secondary effects is insufficient to survive intermediate scrutiny. The governmental interest of regulating secondary effects may only be upheld as substantial if a connection can be made between the negative effects and the regulated speech. In evaluating the sufficiency of this connection, courts must 'examine evidence concerning regulated speech and secondary effects.' *Alameda Books*, 535 U.S. at 441, 122 S.Ct. 1728.")

22nd Ave Station, Inc. v. City of Minneapolis, 429 F.Suppp.2d 1144 (D.Minn. 2006)

> ("As the Supreme Court explained in *Alameda*, even if the City has made a facially sufficient factual showing to justify its ordinance, the affected party may cast direct doubt on the City's rationale by showing that

> the City's evidence does not support its rationale or by furnishing evidence that disputes the City's factual findings. . .If the affected party succeeds in casting direct doubt, 'the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.' Plaintiff has presented sufficient evidence to cast direct doubt on the City's rationale. It has submitted both an expert affidavit and a peer-reviewed study casting grave doubt on the reliability of the foreign studies upon which the City relied. It has submitted its own recent expert analysis of Plaintiff's impact on crime, property values, and blight in its surrounding neighborhood, which shows that Plaintiff has not caused the secondary effects that the City seeks to combat. The City has provided no contrary evidence regarding the impact of 22nd Avenue Station on its neighborhood.");

Flanigan's Enterprises Inc. v. Fulton County, 2006 WL 2927532 (N.D. Ga. 2006)

> ("Fulton County has failed to show that the ordinance furthers an important governmental interest because it did not consider the most comprehensive analysis of the secondary effects of alcohol consumption in adult entertainment establishments. Instead, the defendants, relied on less relevant studies that supported the county's goal. Once again, this court concludes that it

> was unreasonable to ignore the most relevant local study in favor of a less comprehensive study and foreign studies; therefore, the ordinance is an unconstitutional restraint on the plaintiffs' constitutional rights under the First Amendment.")

As the above excerpts show, the decisions construing the "shifting burden" of *Alameda Books* are truly "all over the road."

What is clear is that the instant action shows, perhaps more than any other, that a governmental body, insistent on advancing a perhaps well intended but questionably useful regulation that simply eliminates lawful speech under the cloak of advancing some nebulous "governmental interest" can "pick and choose" what type of "evidence" it relies on in an effort to uphold legislation not actually based on any legitimate concern with "secondary effects." It is a fundamental denial of due process to allow a government to exercise a sensorial animus without the ability of adversely affected parties to present evidence and testimony supporting their position on a contested issue. Without such opportunity, the same miscarriage of justice represented by the instant action is destined to be repeated, at the expense of the businesses involved, their employees, their families and, most critically, at the expense of freedom.

CONCLUSION

The state of confusion and chaos involving the rules of evidence as they apply to the evaluation of challenges to adult entertainment legislation is monumental. These conflicts and inconsistencies, stemming from many courts' inability or refusal to apply the "burden shifting" analysis set forth in *Alameda Books*, justify review of this action. The instant Petition, dealing with a summary judgment, underscores the "worst case scenario" of the abandonment of the rules of evidence when it comes to evaluating countervailing evidence in the context of adult entertainment businesses. Review is necessary to ensure appropriate clarification of the rampant confusion and conflict with this Court's decisions in this area, all of which show the necessity for this Court to provide clarification, guidance, and precision in this critical area of First Amendment jurisprudence. For these reasons, Petitioners respectfully submit the foregoing additional considerations in support of instant petition for a writ of certiorari. It is respectfully requested that this Court grant review in this action.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED SEPTEMBER 18, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-14955

5634 EAST HILLSBOROUGH AVENUE, INC., d.b.a. Tootsies, Gemini Property Ventures, LLC, d.b.a. Showgirls, et al.,

Plaintiffs-Appellants, Cross-Appellees,

versus

HILLSBOROUGH COUNTY, FL, a political subdivision of the State of Florida,

Defendant-Appellee, Cross-Appellant.

(September 18, 2008)

Before ANDERSON, BARKETT and HILL, Circuit Judges.

PER CURIAM:

We held oral argument in this appeal on September 8, 2008. At the outset, we note that appellants have abandoned on appeal numerous arguments that they

either made or could have made in the district court and on appeal. For example, we note that there are three ordinances at issue, a zoning ordinance, a licensing ordinance, and an ordinance regulating bikini bars. Appellants make no distinction amongst the three ordinances; nor do they suggest that a different analysis might apply. Rather, appellants' sole, and narrow, argument on appeal is that appellants adduced sufficient evidence to create genuine issues of fact with respect to whether the county satisfied its evidentiary burden to show that its ordinances have the purpose and effect of suppressing secondary effects. Thus, appellants do not challenge the district court's resolution of any of the other aspects of the analysis for zoning ordinances set out in *Peek-A-Boo Lounge of Bradenton v. Manatee County,* 337 F.3d 1251, 1265-66 (11th Cir.2003). Appellants have not challenged the district court's conclusion that the ordinances at issue do not constitute a total ban, but rather constitute merely time, place and manner regulations. And appellants do not challenge the district court's conclusion that, as a time, place and manner regulation, the ordinances are subject to intermediate scrutiny. Finally, although appellants do challenge whether the ordinances were designed to serve a substantial governmental interest, they do not challenge the district court's conclusion that the ordinances allowed for reasonable alternative channels of communication. Similarly, appellants do not argue that the four pronged analysis derived from *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), is applicable. Accordingly, the only issue for appeal is whether appellants have created a genuine

issue of material fact with respect to whether the county met its evidentiary burden to show that its ordinances have the purpose and effect of suppressing secondary effects.[1]

Addressing that single issue, we note that appellants' briefs on appeal describe the evidence adduced by appellants in completely conclusory fashion. When pressed at oral argument, counsel for appellants asserted that its experts challenged the methodology of the studies put forward by the County to establish that the ordinances had the purpose and effect of reducing the secondary effects of such businesses. However, counsel's description of the alleged flaws in the County's evidence left us with the firm conviction that there was little or no diminishment in the force of the County's evidence. Appellants' brief on appeal contained vague suggestions that appellants may have adduced evidence that the particular businesses of appellants had not caused such secondary effects. However, in light of the County's assertion in brief that appellants had adduced no such local evidence, we pressed appellants' counsel at oral argument for a description thereof. The only evidence counsel could describe was their expert's assertion that the calls for police help from one of appellants' businesses compared favorably to non-adult businesses. Of course, binding case law has discounted the value of such 911 calls as indicative of the kind of secondary effects which are the focus of the County's ordinances.

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1. Of course, with respect to any other issue, we express no opinion on the law or the application of the law to the facts here.

Appendix A

After oral argument and careful consideration, we conclude that the County met its evidentiary burden to show that its ordinances have the purpose and effect of suppressing secondary effects. We conclude that appellants have pointed to no evidence that would create a genuine issue of fact as to whether the County was reasonable in relying on their evidence and their rationale that the ordinances would reduce secondary effects. Accordingly, we conclude that the County has established that it was reasonable in this regard.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED AND FILED OCTOBER 4, 2007

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO: 8:06-cv-1695-T-26EAJ

5634 EAST HILLSBOROUGH AVENUE, INC., d/b/a "Tootsies;" Gemini Property Ventures, LLC, d/b/a "Showgirls;" and Showgirls Mens Club, Inc., d/b/a "Showgirls,"

Plaintiffs,

v.

HILLSBOROUGH COUNTY, FLORIDA,

Defendant.

ORDER

Before the Court is Defendant's Motion for Summary Judgment and various affidavits, depositions, exhibits[1] and Plaintiff's Response in Opposition and affidavits and exhibits.[2] After careful consideration of the arguments, the record and the applicable law, the Court concludes that the Motion should be granted.

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1. *See* dockets 35 [illegible].

2. *See* dockets 45, 46 & 47.

Appendix B

Background

The Plaintiffs in this consolidated action are sexually oriented businesses located in Hillsborough County, Florida. This action involves a constitutional challenge, both facially and "as applied" to three adult use ordinances. In one of the two complaints,[3] the Plaintiffs are "bikini bars" located in the County: Tootsies in Tampa, Showgirls in Plant City, and Showgirls in Valrico. In the second complaint,[4] the Plaintiffs include additional adult businesses in Hillsborough County, including the adult book stores known as 4-Play Videos III, Pleasures I, and Planet X, all licensed adult bookstores in Tampa, and an additional bikini bar known as Showgirls Men's Club in Brandon.[5] According to the first complaint, a "bikini bar" is "a place of public assembly serving alcohol to patrons, in conjunction with providing First Amendment protected dance performances, the content of which emphasizes issues dealing with a variety of human emotions, all presented by females wearing [bikinis]."[6] These bikini bars are located in "an area of generic commercial uses which are fronted by widely traveled roads."[7]

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3. *See* docket 1.

4. *See* docket 1 at 8:06-cv-2323-T-26MAP.

5. *See* docket 1 at 8:06-cv-2323-T-26MAP at paras. 8-13.

6. *See* docket 1 at paras. 8, 9 & 10.

7. *See* docket 1 at para. 14; docket 1 at 8:06-cv-2323-T-26MAP at para. 16.

Appendix B

On September 7, 2006, Hillsborough County's Board of Commissioners (the Board) unanimously adopted three ordinances[8] which regulate sexually oriented businesses in Hillsborough County: Ordinance 06-24; Ordinance 06-25, and Ordinance 06-26.[9] All of these three ordinances regulate sexually oriented businesses. Ordinance 6-24 involves zoning, Ordinance 06-25 involves licensing and regulations, and Ordinance 6-26 involves "bikini bars." The purpose of all three ordinances is articulated in the body of the ordinances as follows:

> It is the purpose of this ordinance to regulate [*the location of sexually oriented businesses* in Ord. 06-24; *sexually oriented businesses* in Ord. 06-25; *alcoholic beverage establishments* in Ord. 06-26] in order to promote the health, safety, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of [*sexually oriented businesses within the County* in Ords. 06-24 & 06-25; *paid physical contact in alcoholic beverage establishments between patrons and certain employees of the establishment* in Ord. 06-26]. The provisions of this ordinance have neither the purpose nor effect of imposing a

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8. *See* docket 35, Ex. A, B & C.

9. The effective date of the ordinances was January 10, 2007; however, according to the County, it has not enforced the three ordinances against the Plaintiffs in this action.

> limitation or restriction on the content or reasonable access to any communicative materials, including sexually oriented materials. Similarly, it is neither the purpose nor effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the purpose nor effect of this ordinance to condone or legitimize the distribution of obscene material *or performances.*

Ord. 06-24 § 2.02.06(D)(1); Ord. 06-25 § 2 1/2-41(a); Ord. 06-26 § 3-61(A) (emphasis added). Each ordinance also contains a section titled "Findings and Rationale" which recites that the Board has reviewed evidence of adverse secondary effects of adult uses presented in hearings and in reports made available to the Board and lists numerous opinions in cases in which courts have interpreted evidence of this nature. Ord. 06-24 § 2.02.06(D)(2); Ord. 06-25 § 2 1/2-41(b); Ord. 06-26 § 3-61(B).

Relying on the cases cited in addition to evidence presented in hearings and reports made available to the Board, each of the three ordinances articulates the findings. In both the zoning and the licensing and regulatory ordinances, the findings by the Board are as follows:

Appendix B

> Sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, public safety risks, prostitution, potential spread of disease, lewdness, public indecency, illicit sexual activity, illicit drug use and drug trafficking, undesirable and criminal behavior associated with alcohol consumption, negative impacts on surrounding properties, litter, and sexual assault and exploitation.
>
> . . . .[10]
>
> Each of the foregoing negative secondary effects constitutes a harm which the County has a substantial government interest in preventing and/or abating in the future. This substantial government interest in

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10. The zoning ordinance contains the following additional statement regarding the location of sexually oriented businesses:

> Sexually oriented businesses should be separated from sensitive land uses to minimize the impact of their secondary effects upon such uses, and should be separated from other sexually oriented businesses, to minimize the secondary effects associated with such uses and to prevent an unnecessary concentration of sexually oriented businesses in one area.

Ord. 06-24 § 2.02.06(D)(2)(b).

> preventing secondary effects, which is the County's rationale for this ordinance, exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses. Additionally, the County's interest in regulating sexually oriented businesses extends to future secondary effects that could occur in the County related to current sexually oriented businesses as well as sexually oriented businesses that may locate in the County in the future. The County finds that the cases and secondary effects documentation relied on in this ordinance are reasonably believed to be relevant to said secondary effects.

Ord. 06-24 § 2.02.06(D)(2)(a)(c); Ord. 06-25 § 2 1/2-41(b)(1)(2). The "bikini bar" ordinance[11] contains the following findings by the Board:

> 1. Paid physical contact between scantily-clad employees of alcoholic beverage establishments, including "bed" dances, "couch" dances, and "lap" dances as they are commonly called, are associated with and can lead to illicit sexual activities, including masturbation, lewdness, and prostitution, as well as other negative effects, including sexual assault.
>
> 2. The County finds that such paid physical contact by bikini-clad or otherwise scantily-

11. Ord. 06-26.

clad employees in alcoholic beverage establishments, even though said employees are not nude or semi-nude as defined in other portions of the Hillsborough County code, is substantially similar to and presents similar concerns as conduct by nude and semi-nude performers in sexually oriented businesses.

3. Each of the negative effects targeted by this ordinance constitutes a harm which the County has a substantial government interest in preventing and/or abating in the future. This substantial government interest in preventing such negative effects, which is the County's rationale for this ordinance, exists independent of any comparative analysis between the regulated establishments and other, non-regulated establishments. The County finds that the cases and secondary effects documentation relied on in this ordinance are reasonably believed to be relevant to the County's interest in preventing illicit sexual behavior.

Ord. 06-26 § 3-61(B)(1)(2)(3).

Two public hearings were held before the Board prior to their adoption—one on August 2, 2006, and the other on August 16, 2006. Testimony was adduced both for and against the ordinances. The Board also reviewed

judicial decisions,[12] secondary effects reports,[13] and affidavits from private investigators.[14] Both sides

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12. *See* docket 36 at Ex. D-01.

13. *See* docket 36 at Ex. D-05, pp. 8-11 (documenting higher sex-related crimes in study areas and 89% of indecent exposure crimes were committed on premises of adult businesses-study done in Phoenix in 1979); Ex. D-04, pp. 13-14 (documenting "illegal sex and unsanitary conditions in sexually oriented businesses"-study done in Tucson in 1990); Ex. D-07, pp. 5-6 & 8 (articulating findings on criminal activities of prostitution, public lewdness, narcotics and indecent exposure associated with sexually oriented businesses and difficulty in enforcement of laws due to private areas blocked from view and booth configurations-legislative report in 1997 by Houston City council); Exs. D-08-18, D20a-23 (including reports from various cities including the dramatic decline in crime in Times Square after the removal of sexually oriented businesses there); Ex. D-19, pp. 32-38 (documenting paid acts of females engaging in masturbation in adult cabarets-transcript from testimony taken in Phoenix's hearings in "Adult Cabaret" in 1997). The record contains numerous additional studies, expert reports from other cases and testimony from other proceedings which predominantly support the fact that higher crime rates occur in areas where sexually oriented businesses exist.

14. *See* docket 36, Ex. D-03, which contains numerous affidavits from private investigators' visits to numerous bikini bars and adult bookstores in Hillsborough County. Many of the adult bookstores had peep show booths in which evidence of masturbation was detected. One of the investigators purchased a "bed dance" and a "couch dance" from the employees at a bikini bar. Ex. D-03, pp. 2-3. Another investigator returned at a later time and received lap dances from two other employees. Ex. D-33. The Board also reviewed affidavits from private investigators' visits to sexually oriented businesses in Manatee County which contained similar evidence. Ex. D-25 & D-26.

presented opinions from retained expert witnesses.[15] The County retained Richard McCleary, Ph.D., a criminologist and university professor who provided two reports.[16] Experts were also retained by the opposition to the ordinances: Terry A. Danner, Ph.D., who is the Chair for the Department of Criminal Justice at Saint Leo University; Randy D. Fisher, Ph.D., who is an associate professor of Psychology and Director of the Survey Research Laboratory at the University of Central Florida; Judith Lynne Hanna, Ph.D., who is an anthropologist, dance scholar and dance critic; and Richard Schauseil, who is a licensed Florida real estate agent.[17] The experts for the Plaintiffs opined that the crime associated with sexually oriented businesses was not more prevalent in areas where they are located, contrary to the reports provided by the experts retained

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15. *See* docket 37 Ex. D-29 & D-30 (providing opinions in favor of the passage of the ordinance); dockets 38-42 Ex. D-34a-34h, D35a-35h, D36a-36e, D37a-37g & D38a-d (providing opinions opposed to the passage of the ordinance).

16. *See* docket 37, Ex. D-29 & D-30 (substantiating that negative secondary effects of sexually oriented businesses such as ambient crime, illicit behavior such as paid sexual touching, and the spread of disease resulting from illicit sexual behavior, are well-documented and need not be established by comparing adult and non-adult businesses such as bars—report prepared by Richard McCleary, Ph.D. to the Board dated August 30, 2006).

17. Three of these four experts were used in the opposition to summary judgment in *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1270-71 (11th Cir.2003). No mention is made in the opinion of Dr. Hanna.

by the County.[18] The Board considered all of the reports and testimony, both for and against the passage of the ordinances.

Applicable Law

The standard of review that applies to facial and "as applied" challenges to sexually oriented business ordinances is "intermediate scrutiny," as opposed to strict scrutiny, provided the ordinances do not totally ban sexually oriented businesses and they serve a substantial government interest such as curtailing adverse secondary effects. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 1391, 146 L.Ed.2d 265 (2000) (plurality opinion). In construing these types of ordinances, courts first look at whether the local

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18. In this summary judgment proceeding, Plaintiffs submitted four new affidavits of their experts. To the extent they contain material and opinions of experts not previously disclosed to the County, this Court should not consider them. *See Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1247 (11th Cir.2007) (striking new affidavits from four experts as untimely because they were filed in response to motion for summary judgment and information had not been earlier disclosed); *Norfolk Southern Corp. v. Chevron U.S.A., Inc.*, 279 F.Supp.2d 1250, 1274 (M.D.Fla.2003), *rev'd on other grounds*, 371 F.3d 1285 (11th Cir.2004) (holding that where affidavits of experts were filed after hearing on motion for summary judgment and affidavits contain information not found in original opinion, affidavits were stricken as late-filed expert disclosures which were prejudicial). Nevertheless, out of an abundance of caution, this Court has considered them in this summary judgment proceeding.

government has carried its initial burden of showing that the ordinance was enacted for the purpose of regulating "adverse secondary effects." If the local government shows that the ordinance was enacted for this purpose, then the ordinance is deemed to be content-neutral, not directed at speech, and does not require strict scrutiny. Once this initial burden is satisfied, the burden shifts to the sexually oriented business to "cast direct doubt" on the local entity's rationale that enough evidence was presented to support its claim that its ordinance serves to reduce secondary effects without substantially reducing speech.[19] *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 451, 122 S.Ct. 1728, 1742-43, 152 L.Ed.2d 670 (2002); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.*, 337 F.3d 1251, 1263-64 (11th Cir.2003), *cert. denied*, 541 U.S. 988, 124 S.Ct. 2016, 158 L.Ed.2d 491 (2004). If doubt is cast on the rationale for the ordinance, then, presumably, the local entity must submit additional evidence to remove that doubt.

The amount of evidence the local government needs to support its rationale for its ordinance is "very little." *Alameda Books*, 535 U.S. at 451, 122 S.Ct. at 1742-43;

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19. That the local entity cannot rely on "shoddy data or reasoning" is true; however, this statement in the plurality opinion of *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39, 122 S.Ct. 1728, 1736, 152 L.Ed.2d 670 (2002), does not raise the evidentiary bar for the local government. *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F.3d 860, 880 (11th Cir.2007) (citing Justice Kennedy's concurrence as the holding in *Alameda*).

Daytona Grand, Inc. v. City of Daytona Beach, Fla., 490 F.3d 860, 880 (11th Cir.2007).[20] The same evidentiary standard of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 115 L.Ed.2d 504 (1991) remains in place today:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is *reasonably believed to be relevant* to the problem that the city addresses.

Alameda Books, 535 U.S. at 451, 122 S.Ct. at 1743 (quoting *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925, 89 L.Ed.2d 29) (emphasis added); *Daytona Grand*, 490 F.3d at 880 (quoting same).

The Eleventh Circuit in *Peek-A-Boo Lounge* traced the history of how the United States Supreme Court has analyzed cases involving a local government's ordinance adopted to reduce the secondary effects of adult entertainment establishments. Generally, zoning ordinance cases are analyzed using the evidentiary standard set forth in *Renton*,[21] and public nudity

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20. *Daytona Grand* became final on September 17, 2007, the date the mandate issued from the Eleventh Circuit Court of Appeals. *See* 6:02-cv-1468-JA-KRS at docket 202.

21. Zoning ordinances limiting the location of adult businesses are evaluated based on time, place, and manner (Cont'd)

ordinance cases are reviewed by the standard articulated in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).[22] *Peek-A-Boo Lounge*, 337 F.3d at 1255-56. Over the years, however, the Supreme Court has melded the two standards together to some degree, largely due to the numerous plurality opinions. *Peek-A-Boo Lounge*, 337 F.3d at 1255. For

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(Cont'd)
regulations. A zoning ordinance is reviewed based on the following framework:

> [F]irst, the court must determine whether the ordinance constitutes an invalid total ban or merely a time, place, and manner regulation; second, if the ordinance is determined to be a time, place, and manner regulation, the court must decide whether the ordinance should be subject to strict or intermediate scrutiny; and third, if the ordinance is held to be subject to intermediate scrutiny, the court must determine whether it is designed to serve a substantial government interest and allows for reasonable alternative channels of communication.

Daytona Grand, 490 F.3d at 870.

22. A public nudity ordinance should be upheld if the following four prongs are met:

> (1) [is] within the constitutional power of the government to enact; (2) further[s] a substantial government interest; (3)[is] unrelated to the suppression of free expression; and (4) restrict[s] First Amendment freedoms no greater than necessary to further the government's interest.

Peek-A-Boo Lounge, 337 F.3d at 1264.

example, although *Renton* applies to zoning ordinances, the third prong of the *Renton* standard is the second prong of the *O'Brien* standard. *Daytona Grand*, 490 F.3d at 874 n. 20; *Peek-A-Boo Lounge*, 337 F.3d at 1264 (relying on *Alameda Books*). In analyzing the cases, it is well-established that the local government need only recite in its ordinance "the protection and preservation of the quality of life in the city" in order to show that reducing negative secondary effects is the rationale for the ordinance. *Zibtluda, LLC v. Gwinnett County, Ga.*, 411 F.3d 1278, 1286 (11th Cir.2005).

The case of *Daytona Grand* is the most recent statement on the standard to be applied in this case. In *Daytona Grand*, the Eleventh Circuit followed the standard set forth in *Peek-A-Boo Lounge* and the precedent relied on therein when it reversed the district court on its ruling voiding the three nudity ordinances after denying summary judgment and conducting a six-day bench trial. The Eleventh Circuit reiterated its statement in *Peek-A-Boo Lounge* regarding the type of evidence necessary to support a local entity's rationale:

> To satisfy *Renton*, any evidence "reasonably believed to be relevant"—including a municipality's own findings, evidence gathered by other localities, or evidence described in judicial opinion—may form an adequate predicate to the adoption of a secondary effects ordinance.

Daytona Grand, 490 F.3d at 881. The entity need not rely on "empirical" studies as opposed to "anecdotal"

accounts. *Id.* "Anecdotal evidence is not 'shoddy' *per se.*" *Id.* If the local entity could have reached a different conclusion about the interaction between adult businesses and adverse secondary effects based on its own knowledge, the ordinance is not considered unconstitutional. *Id.* As long as the entity's rationale for the ordinance is reasonable, even if other reasonable but different conclusions exist, the court must not substitute its judgment for the local government's. *Id.* at 882.

Argument

Plaintiffs primarily argue that they submitted evidence at the public hearing in the form of expert reports, opinions, and testimony, and now on summary judgment in the form of four affidavits from their four experts, that refute the data submitted by the County. Additionally, Plaintiffs argue that the data provided by the County does not relate to the areas surrounding the Plaintiffs' businesses in Hillsborough County. Plaintiffs contend that summary judgment must not be permitted because a genuine issue of material fact has been shown through the discrepancies between the data submitted by the County and Plaintiffs' own affiants' information. Plaintiffs' experts claim that Plaintiffs' businesses add no heightened probability that crime occurs more frequently in areas where sexually oriented businesses are located as opposed to any other type of "non-adult" business.

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The County argues that its evidence supports its rationale for the creation of all three ordinances. The ordinances, it argues, are deemed to be content-neutral and are narrowly tailored to combat the adverse secondary effects of sexually oriented businesses. Without banning speech, the ordinances fairly regulate the time, place and manner in which sexually oriented businesses may operate. The County argues that it was not required to show that its ordinances regulate all sources of secondary effects or that "non-adult" entertainment businesses have just as many or greater negative secondary effects than sexually oriented businesses. The County contends that the Plaintiffs' evidence did not cast doubt on the rationale for the ordinances, which is supported by judicial opinions, reports, studies, expert opinions, direct testimony, and direct evidence from investigators visiting adult book stores and bikini bars in Hillsborough County.

Analysis

The Court agrees with the County. There is no question from a reading of the three ordinances that they do not constitute a ban on sexually oriented businesses, but rather regulations on time, place, and manner. The ordinances, as stated in the body of each of them, strive "neither to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market." *See Zibtluda*, 411 F.3d at 1286.

Second, the rationale of the County appears in all three ordinances. The foremost reason for the enactment of the ordinances is "to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the County [Ords. 06-24 & 06-25]" and "of paid physical contact in alcoholic beverage establishments between patrons and certain employees of the establishment [Ord. 06-26]." The rationale is expressed in terms of preventing "deleterious secondary effects." Having placed its rationale in the body of each of the three ordinances, the County has met its initial burden of showing that the ordinances were enacted for the purpose of regulating adverse secondary effects. As such, the ordinances are considered content-neutral, or not directed at speech, and therefore subject to First Amendment review under intermediate scrutiny. *See Daytona Grand*, 490 F.3d at 870 (quoting *Peek-A-Boo Lounge*, 337 F.3d at 1264; *Zibtluda*, 411 F.3d at 1284-85).

Having determined that intermediate scrutiny applies, the Court finds that the ordinances are crafted to serve a substantial government interest—a reduction in negative secondary effects, while allowing for reasonable alternative channels of communication. All three ordinances provide that the "substantial government interest in preventing secondary effects, which is the County's rationale for this ordinance, exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses." Ord. 06-24 § 2.02.06(D)(2)(c); Ord. 06-25 § 2 1/2-41(b)(2).

Appendix B

Plaintiffs attack the County's evidence essentially on the basis that it failed to use empirical studies to show that sexually oriented businesses attract more crime than non-sexually oriented businesses, and in fact, Plaintiffs' experts opined that the opposite is true. Plaintiff takes issue specifically with Dr. McCleary's opinion for the County and points to the twenty-five studies relied on by Dr. Danner to refute the finding that significant crime-related adverse secondary effects are caused by and associated with the operation of sexually oriented businesses.[23]

The County contends that Dr. Danner applied the wrong standard to the ordinances, ignored the County's true rationale for the ordinances, and used faulty data to support his conclusions about the ordinances. In his expert report, Dr. Danner concluded as follows:

> [in] over twenty studies using law enforcement generated crime data and done in five states over 9 years with a variety of research designs have failed to produce any significant evidence that adult cabarets are uniquely criminogenic. The meta-analysis of all these studies combined suggests that alcohol-serving adult cabarets are probably no more likely to facilitate criminal behavior than their non-adult entertainment providing counterparts. It is most likely that alcohol is the common denominator and that whether or not a

23. *See* docket 38 Ex. D34a-34h; docket 47, Exh. A.

> nightclub offers adult entertainment is inconsequential to the crime-related secondary effects produced by such late-night alcohol serving environments. Other business related factors not measured in these studies, such as the quality of management and the details of location, have probably influenced the variance in measurable crime causing effects that have been found among them.

See docket 42, Ex. D38a at p. 16. In his affidavit filed for purposes of this summary judgment, Dr. Danner opined that the operation of adult entertainment businesses does not disproportionately increase criminal activity over and above any normal crime to be expected in a retail business or place of public assembly. In other words, he concluded that adult entertainment businesses are not "uniquely criminogenic." He made a distinction between less frequented adult bookstores and heavily patronized "gentlemen clubs." He noted that the County's evidence was lacking for "bikini bars."

Even if this Court were to consider the information provided in the four affidavits, it would not change the outcome of this case, because the information contained in those affidavits is either already in the legislative record or insufficient to cast doubt on the County's rationale for the ordinances. Considering all of the evidence provided by Plaintiffs' four experts, Drs. Danner, Fisher, and Hanna, and Mr. Schauseil, together, the Court finds that the Board reasonably relied on or "reasonably believed to be relevant" the studies

presented by the County about the problem of adverse secondary effects. *See Peek-A-Boo Lounge,* 337 F.3d at 1262-64. The County submitted more than the "very little evidence" that is required to support its claim that the ordinances serve to reduce adverse secondary effects and do not substantially reduce free speech. *Peek-A-Boo Lounge,* 337 F.3d at 1264. The County not only relied upon an expert and studies used and approved by other courts, but retained investigators who actually visited similar or the same sexually oriented businesses as the Plaintiffs in this case and found evidence to support criminal conduct, the spread of communicable diseases, and other non-crime related adverse secondary effects.

Once the County relied on evidence it reasonably believed to be relevant to the problem of adverse secondary effects, the burden then shifted to the Plaintiffs to "cast direct doubt" on the County's reasoning. This cannot be accomplished, however, by simply providing reports and testimony reaching a contrary conclusion such as those prepared and given by Drs. Danner, Fisher, and Hanna, and Mr. Schauseil, all experts retained by the Plaintiffs.[24] *Daytona Grand* made it clear that given the existence of different conclusions based on studies, either empirical or anecdotal, the Court may not substitute its judgment for the Board. Thus, out of an abundance of caution, this Court has considered all of the evidence, including the information in the four affidavits submitted by Plaintiffs. This Court cannot say that the Plaintiffs have

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24. *See* docket 35 at Ex. J-02, pp. 5-138.

cast direct doubt on the County's rationale for the ordinances. The process is not one in which the County must exclude all theories inconsistent with its own. Even assuming the Plaintiff's position for its rationale is also considered to be plausible and reasonable, this Court, as noted, cannot substitute its judgment for that of the Board. In this case, the Board considered all of the voluminous reports and the testimony at the public hearings and concluded that the County's rationale for these three ordinances was reasonably believed to be relevant to the reduction of adverse secondary effects associated with sexually oriented businesses. This record contains no basis upon which to reverse that determination.

It is therefore **ORDERED AND ADJUDGED** as follows:

(1) Defendant's Motion for Summary Judgment (Dkt.35) is **GRANTED.**

(2) The Clerk is directed to enter Final Summary Judgment in favor of Defendant and against Plaintiffs.

(3) The Clerk is directed to close this case.

DONE AND ORDERED at Tampa, Florida, on October 4, 2007.

s/ Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED NOVEMBER 13, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-14955

5634 EAST HILLSBOROUGH AVENUE, INC., d.b.a. Tootsies, GEMINI PROPERTY VENTURES, LLC, d.b.a. Showgirls, SHOWGIRLS MEN'S CLUB, INC., d.b.a. Showgirls, 3630 CORPORATION, INC., a Florida Corporation d.b.a. 4-Play Videos III, PLEASURES VIDEO, INC., a Florida Corporation d.b.a. Pleasures I, PLANET X SUPER CENTER, INC., d.b.a. Planet X,

Plaintiffs-Appellants
Cross-Appellees,

versus

HILLSBOROUGH COUNTY, FL,
a political subdivision of the State of Florida,

Defendant-Appellee
Cross-Appellant.

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: ANDERSON, BARKETT and HILL, Circuit Judges.

Appendix C

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
STATES CIRCUIT JUDGE

APPENDIX D — RELEVANT PORTIONS OF ORDINANCE 06-24

Ordinance 06-24

Sec. 2.02.06. Additional Location Restrictions for Sexually Oriented Businesses

A. Proximity to Sensitive Land Uses and Areas

No sexually oriented business may be established within 2,000 feet of any area zoned for residential use, including, but not limited to, residential portions of C-U, PD, or U-C zoning districts, nor within 2,000 feet of any church, child care facility, or public recreation area, nor within 2,500 feet from any public or private school. These distance requirements apply regardless of whether the area zoned for residential use, the church, school, child care facility or public recreation area is within unincorporated Hillsborough County or in an adjacent jurisdiction.

B. Proximity to Other Sexually Oriented Businesses

No sexually oriented business may be established within 500 feet of any other sexually oriented business.

C. Calculation of Distances

Distances shall be measured from property line to property line, along the shortest distance between property lines, without regard to the route of normal travel. Nothing in this section shall be construed to permit the operation of any business or the performance

of any activity prohibited under any other section of this Code. Additionally, nothing in this Code shall be construed to authorize, allow or permit the establishment of any business, the performance of any activity, or the possession of any item, which is obscene under the judicially established definition of obscenity.

[The remaining components of Ordinance 06-24 are set forth and adopted in Ordinance 06-25, and are therefore omitted from this section for brevity.]

APPENDIX E — RELEVANT PORTIONS OF ORDINANCE NO. 06-25

ORDINANCE NO. 06-25

AN ORDINANCE OF HILLSBOROUGH COUNTY, FLORIDA, ESTABLISHING LICENSING REQUIREMENTS AND REGULATIONS FOR SEXUALLY ORIENTED BUSINESSES; SETTING FORTH FINDINGS; ESTABLISHING DEFINITIONS; IMPOSING FEES; REQUIRING INSPECTIONS OF PREMISES; PROVIDING FOR EXPIRATION, SUSPENSION, AND REVOCATION OF LICENSES; PROVIDING FOR BEARINGS AND APPEALS; PROHIBITING TRANSFER OF LICENSES; LIMITING HOURS OF OPERATION; REGULATING EXHIBITION OF SEXUALLY EXPLICIT FILMS OR VIDEOS; IMPOSING DUTIES REGARDING LOITERING, EXTERIOR LIGHTING, VISIBILITY AND MONITORING OUTSIDE PREMISES; PROVIDING FOR PENALTIES AND ENFORCEMENT; PROVIDING FOR APPLICABILITY TO EXISTING BUSINESSES; IMPOSING PROHIBITIONS OF NUDITY, PHYSICAL CONTACT, ALCOHOLIC CONSUMPTION; REQUIRING SEPARATION BETWEEN EMPLOYEES AND CUSTOMERS; REQUIRING SCIENTER; PRESERVING APPLICANT RIGHTS IN EVENT OF COUNTY FAILURE TO ACT; PROVIDING FOR SEVERABILITY; REPEALING CONFLICTING PROVISIONS; PROVIDING AN EFFECTIVE DATE.

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Section

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2 1/2-54	Regulations pertaining to exhibition of sexually explicit films on premises.
2 1/2-55	Loitering and exterior lighting and monitoring requirements.
2 1/2-56	Penalties and enforcement.
2 1/2-57	Applicability of ordinance to existing businesses.
2 1/2-58	Conduct regulations.
2 1/2-59	Regulations for adult mobile cabarets.
2 1/2-60	Scienter required to prove violation or business licensee liability.
2 1/2-61	Failure of county to meet time frame not to risk applicant/licensee rights.
2 1/2-62	Severability.
2 1/2-63	Conflicting code provisions repealed.

WHEREAS, sexually oriented businesses require special supervision from the public safety agencies of the County in order to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the citizens of the County; and

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WHEREAS, the Board of County. Commissioners finds that sexually oriented businesses, as a category of establishments, are used for unlawful sexual activities, including public masturbation, lewdness, and prostitution; and

WHEREAS, there is convincing documented evidence that sexually oriented businesses, *as a* category of establishments, have deleterious secondary effects and are often associated with crime and adverse impacts on surrounding areas; and

WHEREAS, the County recognizes its constitutional duty to interpret, construe, and amend its laws and ordinances to comply with constitutional requirements as they are announced; and

WHEREAS, with the passage of any ordinance, the County and the Board of County Commissioners accept as binding the applicability of general principles of criminal and civil law and procedure and the rights and obligations under the United States and Florida Constitutions, Florida Law, and the Florida Rules of Civil and Criminal Procedure; and

WHEREAS, it is not the intent of this ordinance to suppress any speech activities protected by the U.S. Constitution or the Florida Constitution, but to enact an ordinance to further the content-neutral governmental interests of the County, to wit, the controlling of secondary effects of sexually oriented businesses.

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NOW, THEREFORE, BE IT ORDAINED by the Board of County Commissioners of Hillsborough County, Florida:

Section 1.

Chapter 2 1/2 of the Hillsborough County Code of Ordinances, is hereby amended to add Article III, known as the "Sexually Oriented Business Code" which is as follows:

Sec. 2 1/2-41. Rationale and Findings.

(a) Purpose. It is the purpose of this ordinance to regulate sexually oriented businesses in order to promote the health, safety, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the County. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content or reasonable access to any communicative materials, including sexually oriented' materials. Similarly, it is neither the purpose nor effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the purpose nor effect of this ordinance to condone or legitimize the distribution of obscene material.

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(b) Findings and Rationale. Based on evidence of the adverse secondary effects of adult uses presented in hearings and in reports made available to the Board of County Commissioners, and on findings, interpretations, and narrowing constructions incorporated in numerous cases, including, but not limited to *City of Littleton v. Z.J. Gifts D-4, L,L.C.*, 541 U.S. 774 (2004); *Pap's A.M. v. City of Erie*, 529 U.S. 277 (2000); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *California* v. *LaRue*, 409 U.S. 109 (1972); as well as in the cases of *Artistic Entertainment, Inc. v. City of Warner Robins*, 223 F.3d 1306 (11th Cir. 2000); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003); *Gary v. City of Warner Robins*, 311 F.3d 1334 (11th Cir. 2002); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003); *Wise Enters. v. Unified Gov't of Athens-Clarke County*, 217 F.3d 1360 (11th Cir. 2000); *BZAPs, Inc. v. City of Mankato*, 268 F.3d 603 (8 Cir. 2001); *World Wide Video of Washington, Inc.* v. *City of Spokane*, 368 F.3d 1186 (9th Cir. 2004); *Gammoh v. City of La Habra*, 395 F.3d 1114 (9th Cir. 2005); *Ward v, County of Orange*, 217 F.3d 1350 (11th Cir. 2000); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999); *David Vincent, Inc. v. Broward County*, 200 F.3d 1325 (11th Cir 2000); *Sammy's of Mobile, Ltd v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir.

1999); *Lady J. Lingerie, Inc. v. City of Jacksonville,* 973 F.Supp. 1428 (M.D. Fla. 1997); *Grand Faloon Tavern, Inc. v. Wicker,* 670 F.2d 943 (11th Cir. 1982); *Board of County Commissioners v. Dexterhouse,* 348 So. 2d 916 (Ct. App. Fla. 1977); *International Food & Beverage Systems* v. *Ft. Lauderdale,* 794 F.2d 1520 (11th Cir. 1986); *Gammoh* v. *City of La Habra,* 395 F.3d 1114 (8th Cir. 2005); and other cases; and on reports of secondary effects occurring in and around sexually oriented businesses, including, but not limited to, Phoenix, Arizona - 1979; Houston, Texas – 1983, 1997; Indianapolis, Indiana - 1984; Amarillo, Texas - 1977; Garden Grove, California - 1991; Los Angeles, California. - 1977; Whittier, California - 1978; Austin, Texas - 1986; Oklahoma City, Oklahoma - 1986; Dallas, Texas – 1997, 2004; Newport News, Virginia - 1996; New York Times Square study - 1994; Phoenix, Arizona – 1995-98; Centralia, Washington – 2004; Greensboro, North Carolina – 2003; and also on findings of physical abuse from the papers entitled "Stripclubs According to Strippers: Exposing Workplace Sexual Violence," by Kelly Holsopple, Program Director, Freedom and Justice Center for Prostitution Resources, Minneapolis, Minnesota; Expert Report of Richard McCleary, Ph.D., Dec. 18, 2004; Affidavits of Tom McCarren; "Sexually Oriented Businesses: An Insider's View," by David Sherman, presented to the Michigan House Committee on Ethics and Constitutional Law, Jan. 12, 2000; and the Report of the Attorney General's Working Group On The Regulation Of Sexually Oriented Businesses, (June 6, 1989, State of Minnesota), the Board of County Commissioners finds:

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(1) Sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, public safety risks, prostitution, potential spread of disease, lewdness, public indecency, illicit sexual activity, illicit drug use and drug trafficking, undesirable and criminal behavior associated with alcohol consumption, negative impacts on surrounding properties, litter, and sexual assault and exploitation.

(2) Each of the foregoing negative secondary effects constitutes a harm which the County has a substantial government interest in preventing and/or abating in the future. This substantial government interest in preventing secondary effects, which is the County's rationale for this ordinance, exists independent of any comparative analysis between sexually oriented and non-sexually oriented businesses. Additionally, the County's interest in regulating sexually oriented businesses extends to future secondary effects that could occur in the County related to current sexually oriented businesses *as* well as sexually oriented businesses that may locate in the County in the future. The County finds that the cases and secondary effects documentation relied on in this ordinance are reasonably believed to be relevant to said secondary effects.

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Sec. 2 1/2-42. Definitions.

For purposes of this Article, the words and phrases defined in the sections hereunder shall have the meanings therein respectively ascribed to them unless a different meaning is clearly indicated by the context.

"Administrator" means the Hillsborough County Administrator or his/her designee.

"Adult Bookstore" or *"Adult Video Store"* means a commercial establishment which, *as* one of its principal business activities, offers for sale, rental, or viewing for any form of consideration any one or more of the following: books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, video cassettes, compact discs, digital video discs, slides, or other visual representations, which are characterized by their emphasis upon the display of "specified sexual activities" or "specified anatomical areas."

A "principal business activity" means that the commercial establishment:

(1) has a substantial portion of its displayed merchandise which consists of said items; or

(2) has a substantial portion of the wholesale value of its displayed merchandise which consists of said items; or

(3) has a substantial portion of the retail value of its displayed merchandise which consists of said items; or

(4) derives a substantial portion of its revenues from the sale or rental; for any form of consideration, of said items; or

(5) maintains a substantial section of its interior business space for the sale or rental or said items; or

(6) maintains an "adult arcade," which means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are regularly maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are characterized by their emphasis upon matter exhibiting "specified sexual activities" or specified anatomical *areas*,"

"Adult Cabaret" means a nightclub, bar, juice bar, restaurant, bottle club, or similar commercial establishment in a fixed location, regardless of whether alcoholic beverages are served, which regularly features persons who appear semi-nude,

"Adult Mobile Cabaret" means a bus, trailer, or other non-permanent structure which is being used to feature persons who appear semi-nude.

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"Adult Motel" means a motel, hotel, or similar commercial establishment which:

(1) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, other photographic reproductions, or live performances which are characterized by the display of "specified sexual *activities*" or "specified anatomical areas"; and which advertises the availability of such material by means of a sign visible from the public right-of-way, or by means of any on or off-premises advertising, including but not limited to, newspapers, magazines, pamphlets or leaflets, radio or television; and

(2) offers a sleeping room for rent for a period of time that is less than ten (10) hours; or

(3) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than ten (10) hours.

"Adult Motion Picture Theater" means a commercial establishment where films, motion pictures, videocassettes, slides, photographic reproductions, or electronic reproductions, which are characterized by their emphasis upon the display of "specified sexual activities" or "specified anatomical areas" are regularly shown to more than five persons for any form of consideration.

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"Board of County Commissioner?' means the Board of County Commissioners of Hillsborough County, Florida,

"Characterized by" means to describe the essential character or quality of an item. As applied in this ordinance, no business shall be classified as a sexually oriented business by virtue of showing, selling, or renting materials rated NC-17 or R by the Motion Picture Association of America.

"County" means Hillsborough County, Florida.

"Employ," "Employee," and *"Employment"* describe and pertain to any person who performs any service on the premises of a sexually oriented business, on a full time, part time, or contract basis, regardless of whether the person is denominated an employee, independent contractor, agent, or otherwise. Employee does not include a person exclusively on the premises for repair or maintenance of the premises or for the delivery of goods to the premises.

"Establish" or *"Establishment"* shall mean and include any of the following:

(1) The opening or commencement of any sexually oriented business as a new business;

(2) The conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business; or

(3) The addition of any sexually oriented business to any other existing sexually oriented business.

"*Hearing Officer*" shall mean an attorney that is not an employee of the County.

"*Influential Interest*" means any of the following: (1) the actual power to control the operation, management, policies, or premises of a business or entity, including the power exercised by an "operator" as defined herein, or (2) holding an office (e.g., president, vice president, secretary, treasurer, etc.) or directorship in a legal entity which operates a sexually oriented business.

"*Licensee*" shall mean a person in whose name a license to operate *a* sexually oriented business has been issued, as well as the individual or individuals listed as an applicant on the application for a sexually oriented business license. In case of an "employee," it shall mean the person in whose name the sexually oriented business employee license has been issued.

"*Nude,*" "*Nudity*" or "*State of Nudity*" means the showing of the human male or female genitals, pubic area, vulva, or anus with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple.

"*Operate*" or "*Cause to Operate*" shall mean to cause to function or to put or keep in a state of doing business.

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"Operator" means any person on the premises of a sexually oriented business who puts or keeps the business in operation or who is authorized to manage the business or exercise overall operational control of the business premises. A person may be found to be an operator of a sexually oriented business regardless of whether that person is an owner, part owner, or licensee of the business.

"Person" shall mean individual, proprietorship, partnership, corporation, association, or other legal entity.

"Premises" means the real property upon which the sexually oriented business is located, and all appurtenances thereto and buildings thereon, including, but not limited to, the sexually oriented business structure, the grounds, private walkways, parking lots, and/or parking garages adjacent thereto, which are under the ownership, control, or supervision of the licensee, *as* described in the application for a business license pursuant to Sec. 2 1/2-44 of this ordinance.

"Regularly" means the consistent and repeated doing of the act so described.

"Semi-Nude" or *"State of Semi-Nudity"* means the showing of a majority of a female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or the showing of a majority of a male or female buttock.

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"Semi-Nude Model Studio" means a place where persons regularly appear in a state of semi-nudity for money or any form of consideration in order to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons.

This definition does not apply to any place where persons appearing in a state of semi-nudity do so in a modeling class operated:

(1) By a college, junior college, or university supported entirely or partly by taxation;

(2) By a private college or university which maintains and operates educational programs in which credits are transferable to college, junior college, or university supported entirely or partly by taxation; or

(3) In a structure:

a. Which has no sign visible from the exterior of the structure and no other advertising that indicates a semi-nude person is available for viewing; and

b. Where, in order to participate in a class a student must enroll at least three days in advance of the class,

"Sexual Device" means any three (3) dimensional object designed and marketed for stimulation of the male or female human genital organ or anus or for sadomasochistic use or abuse of oneself or others and

shall include devices such as dildos, vibrators, penis pumps, and physical representations of the human genital organs, Nothing in this definition shall be construed to include devices primarily intended for protection against sexually transmitted diseases or for preventing pregnancy.

"*Sexual Device Shop*" means a commercial establishment that regularly features sexual devices. Nothing in this definition shall be construed to include any pharmacy, drug store, medical clinic, or any establishment primarily dedicated to providing medical or healthcare products or services, nor shall this definition be construed to include commercial establishments which do not restrict access to their premises by reason of age.

"*Sexual Encounter Center*" shall mean a business or commercial enterprise that, *as* one of *its* principal business purposes, purports to offer for any form of consideration, physical contact in the form of touching, wrestling or tumbling between persons when one or more of the persons is semi-nude.

"*Sexually Oriented Business*" means an "adult bookstore," an "adult video store," an "adult cabaret," an "adult motel," an "adult motion picture theater," a "semi-nude model studio," a "sexual device shop," or a "sexual encounter center."

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"*Specified Anatomical Areas*" means and includes:

(1) human genitals; pubic region; buttocks; and female breast below a point immediately above the top of the areola; and

(2) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

"*Specified Criminal Activity*" means:

(1) any of the following specified crimes for which less than five (5) years elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date:

a. Fla. Stat. § 794.011 (Sexual battery);

b. Fla. Stat. § 796.03 through § 796.07 (Prostitution offenses);

c. Fla. Stat. § 800.04 (Lewd or lascivious offenses committed upon or in the presence of persons less Than 16 years of age);

d. Fla. Stat. Ch, 847 (Obscenity offenses);

e. Fla. Stat. § 893.13 (Controlled substance offenses);

f. Fla. Stat. Ch. 895 (Offenses concerning racketeering and illegal debts);

g. Any of the foregoing statutory offenses as amended from time to time; or

(2) attempt, solicitation, or conspiracy to commit one of the foregoing statutory offenses; or

(3) any offenses in other jurisdictions that, had the predicate act(s) been committed in

Florida., would have constituted any of the foregoing offenses.

Notwithstanding anything in this definition, of "Specified criminal activity," a conviction that is later reversed, vacated, overturned or expunged by a court of law shall not be considered a "specified criminal activity' under this ordinance.

"Specified Sexual Activity" means any of the following:

(1) sexual intercourse, oral copulation, masturbation, or sodomy; or

(2) excretory functions *as a* part' of or in connection with any of the activities described in (1) above.

"Substantial" means at least thirty-five percent (35%) of the item(s) so modified,

"Transfer of Ownership or Control" of a sexually oriented business shall mean any of the following:

(1) The sale, lease, rental, or sublease of the business;

(2) The establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

"*Viewing Room*" shall mean the room, booth, or area where a patron of sexually oriented business would ordinarily be positioned while watching a film, videocassette, or other visual reproduction,

Sec. 2 1/2-43. Classification.

The classifications for sexually oriented businesses shall be as follows:

a. Adult bookstores or adult video stores;

b. Adult cabarets;

c. Adult motels;

d. Adult motion picture theaters;

e. Semi-nude model studios;

f. Sexual device shops;

g. Sexual encounter centers.

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Sec. 2 1/2-44. License required.

(a) It shall be unlawful for any person to operate a sexually oriented business in Hillsborough County without a valid sexually oriented business license.

(b) It shall be unlawful for any person to be an "employee," as defined in this Article, of a sexually oriented business in Hillsborough County without a valid sexually oriented business employee license.

(c) An applicant for a sexually oriented business license or a sexually oriented business employee license shall file in person at the office of Hillsborough County Administrator's Office a completed application made on a form provided by the County Administrator's Office. A sexually oriented business may designate an individual with an influential interest in the business to file its application for a sexually oriented business license in person on behalf of the business. The application shall be signed as required by subsection (d) herein and shall be notarized. An application shall be considered complete when it contains, for each person required to sign the application, the information and/or items required in Paragraphs 1 through 8 below, accompanied by the appropriate fee identified in the fee schedule adopted by the Board of County Commissioners:

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(d) The applicant's full true name and any other names used by the applicant in the preceding five (5) years.

(1) Current business address or another mailing address of the applicant.

(2) Written proof of age, in the form of a driver's license or a copy of *a* birth certificate accompanied by a picture identification document issued by a governmental agency.

(3) If the application is for a sexually oriented business license, the business name, location, legal description, mailing address and phone number of the sexually oriented business.

(4) If the application is for a sexually oriented business license, the name and business address of the statutory agent or other agent authorized to receive service of process.

(5) A statement of whether an applicant has been convicted of or has pled guilty or nolo contendere to a specified criminal activity *as* defined in this ordinance, and if so, each specified criminal activity involved, including the date, place, and jurisdiction of each *as* well as the dates of conviction

and release from confinement, where applicable,

(7) A statement of whether ally sexually oriented business in which an applicant has had an influential interest in the previous five (5) years has, for conduct occurring when the applicant had the influential interest and had knowledge of the conduct:

a. been declared by a court of law to be a nuisance; or

b. been subject to a court order of closure or padlocking.

(6) An application for a sexually oriented business license shall be accompanied by a legal description of the property where the business is located and a sketch or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared but shall be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six (6) inches. Applicants who are required to comply with Secs. 2 1/2-54 and 2 1/2-58 of this Article shall submit a diagram

indicating that the interior configuration meets the requirements of those sections.

The information provided pursuant to Paragraphs 1 through 8 of this subsection shall be supplemented—in writing by certified mail, return receipt requested, to the County Administrator's Office within ten (10) working days of a change of circumstances which would render the information originally submitted false or incomplete.

(d) If a person who wishes to operate a sexually oriented business is an. individual, he shall sign the application for a license as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each person with an influential interest in the business shall sign the application for a license as applicant. Each applicant must be qualified under Sec. 2 1/2-45 and each applicant shall be considered *a* licensee if a license is granted,

(e) The information provided by an applicant in connection with an application for a license under this Article shall be maintained by the County Administrator's Office on a confidential basis, and such information may be disclosed only as required by law.

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(The excerpts deleted from this portion of the ordinance are not germane to the questions presented)

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Sec. 2 1/2-62. Severability.

This ordinance and each section and provision thereof are hereby declared to be independent divisions and subdivisions and, not withstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provisions of said Article, or the application thereof to any person or circumstance is held to be invalid, the remaining sections or provisions and the application of such sections and provisions to any person or circumstances other than those to which it is held. invalid, shall not be affected thereby, and it is hereby declared that such sections and provisions would have been passed independently of such section or provision so known to be invalid. Should any procedural aspect of this ordinance be invalidated, such invalidation shall not affect the enforceability of the substantive regulations of this ordinance.

Sec. 21/2-63, Conflicting code provisions repealed.

Hillsborough County Ordinance 95-9 and any other provision(s) in the Hillsborough County code of ordinances specifically in conflict with any provision in this ordinance is hereby deemed inoperative and repealed.

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Section 2. Effective date.

This Ordinance shall become effective immediately upon filing with the Florida Department of State.

APPENDIX F — RELEVANT PORTIONS OF ORDINANCE NO. 06-26

ORDINANCE NO. 06- 26

AN ORDINANCE OF HILLSBOROUGH COUNTY, FLORIDA, AMENDING CHAPTER 3 OF THE CODE OF ORDINANCES AND LAWS AS RELATING TO ALCOHOL BEVERAGES BY ADDING A NEW ARTICLE III; SETTING FORTH FINDINGS; SETTING FORTH DEFINITIONS; SETTING FORTH CONDUCT REGULATIONS PROHIBITING PAID PHYSICAL CONTACT BETWEEN PATRONS AND CERTAIN EMPLOYEES; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE.

WHEREAS, certain businesses require special supervision from the public safety agencies of the County in order to protect and preserve the health, safety, and welfare of the patrons of such businesses as well *as* the citizens of the County; and

WHEREAS, the Board of County Commissioners finds that such establishments include those which deal in alcoholic beverages and offer paid physical contact between scantily-clad performers and patrons of the establishment and

WHEREAS, there is convincing documented evidence that such paid physical contact leads to unlawful sexual activities, including masturbation, lewdness, illicit sexual activity, and other negative effects which the County seeks to prevent; and

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WHEREAS, the County recognizes its constitutional duty to interpret, construe, and amend its laws and ordinances to comply with constitutional requirements as they are announced; and

WHEREAS, with the passage of any ordinance, the County and the Board of County Commissioners accept as binding the applicability of general principles of criminal and civil law and procedure and the rights and obligations under the United States and Florida Constitutions, Florida Law, and the Florida Rules of Civil and Criminal Procedure; and

WHEREAS, it is not the intent nor the effect of this ordinance to suppress any speech activities protected by the U.S. Constitution or the Florida Constitution, but to enact an ordinance to further the substantial governmental interests of the County, to wit, the controlling of secondary effects associated with paid physical contact in alcoholic beverage establishments;

NOW, THEREFORE, BE IT ORDAINED by the Board of County Commissioners of Hillsborough County, Florida:

Section I.

Chapter 3 ("Alcoholic Beverages") of the Code of Ordinances and Laws is hereby amended by adding a new Article III, entitled "Paid Physical Contact in Alcoholic Beverage Establishments," as follows:

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Sec. 3-61. Purpose, Rationale and Findings.

A. Purpose. It is the purpose of this ordinance to regulate alcoholic beverage establishments in order to promote the health, safety, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of paid physical contact in alcoholic beverage establishments between patrons and certain employees of the establishment, The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content or reasonable access to any communicative materials or performances, including sexually oriented materials or performances, Similarly, it is neither the purpose nor effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the purpose nor effect of *this* ordinance to condone or legitimize the distribution or presentation of obscene material or performances.

B. Findings and Rationale. Based on evidence of the adverse secondary effects of paid physical contact between patrons and performers in alcoholic beverage establishments, presented in hearings and in reports made available to the Board of County Commissioners, and on findings, interpretations, and narrowing constructions incorporated in numerous cases, including, but not limited to *California v. LaRue,* 409 U.S. 109

(1972); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981); *Gammoh v. City of La Habra*, 395 F.3d 1114 (9th Cir. 2005); *Hang-On, Inc. v. City of Arlington, 65* F.3d 1248 (5th Cir. 1995); *Artistic Entertainment, Inc.* v. *City of Warner Robins*, 223 F.3d 1306 (11th Cir, 2000); *Gary v. City of Warner Robins*, 311 F.3d 1334 (11th Cir. 2002); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Ch. 2003); *BZAPs, Inc. v. City of Mankato*, 268 F.3d 603 (8th Cir. 2001); *World Wide Video of Washington, Inc. v.* City *of Spokane*, 368 F.3d 1186 (9 Cir. 2004); *Gammoh v. City of La Habra*, 395 F.3d 1114 (9th Cir. 2005); *Sammy's of Mobile, Ltd.* v. *City of Mobile*, 140 F.3d 993 (11th Cir. 1998); *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir. 1982); *Board of County Commissioners v. Dexterhouse*, 348 So. 2d 916 (Ct. App. Fla. 1977); *International Food & Beverage Systems v. Ft. Lauderdale*, 794 F.2d 1520 (11th Cir. 1986); and other cases; and on reports of secondary effects occurring in and around sexually oriented businesses, including, but not limited to, Jacksonville, Florida; Dallas, Texas — 1997, 2004; Phoenix, Arizona 1995-98; and also on findings of physical abuse from the papers entitled "Stripclubs According to Strippers: Exposing Workplace Sexual Violence," by Kelly Holsopple, Program Director, Freedom and Justice Center for Prostitution Resources, Minneapolis, Minnesota; Expert Report of Richard McCleary, Ph.D., Dec. 18, 2004; Affidavit of J.R. Long; and "Sexually Oriented Businesses: An Insider's View," by David Sherman, presented to the Michigan House Committee on Ethics and Constitutional Law, Jan, 12, 2000; the Board of County Commissioners finds:

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1. Paid physical contact between scantily-clad employees of alcoholic beverage establishments, including "bed" dances, "couch" dances, and "lap" dances *as* they are commonly *called, are associated* with and can lead to illicit sexual activities, including masturbation, lewdness, and prostitution, as well *as* other negative effects, including sexual assault.

2. The County finds that such paid physical contact by bikini-clad or otherwise scantily-clad employees in alcoholic beverage establishments, even though said employees are not nude or semi-nude *as* defined in other portions of the Hillsborough County code, is substantially similar to and presents similar concerns as conduct by nude and semi-nude performers in sexually oriented businesses.

3. Each of the negative effects targeted by this ordinance constitutes a harm which the County has a substantial government interest in preventing and/or abating in the future. This substantial government interest in preventing such negative effects, which is the County's rationale for this ordinance, exists independent of any comparative analysis between the regulated establishments and other, non-regulated establishments, The County finds that the cases and secondary effects documentation relied on in this ordinance are reasonably believed to be relevant to the County's interest in preventing illicit sexual behavior.

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Sec, 3-62. Definitions

Alcoholic beverages shall mean all beverages containing more than one percent alcohol by weight.

Bikini-clad means a state of dress in which opaque clothing covers (i) the human male or female genitals, pubic area, and buttocks, and (ii) the female breasts below the top of the areolae, but no additional area contiguous to those portions of the body described in (i) and (ii).

Establishment dealing in alcoholic beverages shall mean any business or commercial establishment, whether open to the public at large or where entrance is limited by a cover charge or membership requirement, including those licensed by the state for sale and/or service of alcoholic beverages, and any bottle club; any establishment operated like a bottle club without being called or classed as a bottle club; a hotel; a motel; a restaurant; a night club; a country club; a cabaret; a meeting facility utilized by any religious, social, fraternal, or similar organization; or a business or commercial establishment where a product or article is sold, dispensed, served, or provided with the knowledge, actual or implied, that the same will be or is intended to be mixed, combined with or drunk in connection or combination with an alcoholic beverage served or bought on the premises; or business or commercial establishment where the consumption of alcoholic beverages is permitted, whether bought on the premises or brought onto the premises and thereafter consumed.

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That portion of a facility designed and equipped as a dwelling unit which is actually being used *as a* permanent, temporary, or transient private residence, including, but not limited to, houses, apartments, condominiums, hotel and motel rooms, dormitories, and boarding houses, is not an establishment dealing in alcoholic beverages. This definition shall not be construed or interpreted to apply to any establishment except those where alcoholic beverages, as defined herein, are sold, dispensed, consumed or possessed on the premises, or permitted to be bought on the premises for consumption.

Employee means any person who performs a service on the premises of an establishment dealing in alcoholic beverages on a full time, part time, or contract basis, regardless of whether the person is denominated an employee, independent contractor, agent, or otherwise. Employee does not include a person exclusively on the premises for repair or maintenance of the premises or for the delivery of goods to the premises.

Sec. 3-63. Regulations.

A. No bikini-clad employee of an establishment dealing in alcoholic beverages shall knowingly or intentionally touch or make physical contact with the clothed or unclothed buttocks, breast(s), lap, groin area, or pubic area of a patron on the premises of an establishment dealing in alcoholic beverages.

B. No patron of an establishment dealing in alcoholic beverages shall knowingly or intentionally touch or make physical contact with the clothed or unclothed buttocks, breast(s), lap, groin area, or pubic area of a bikini-clad employee of establishment dealing in alcoholic beverages.

C. No person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall knowingly or intentionally allow conduct prohibited by subsection A or subsection B of this Section 3-63.

Sec. 3-64. Penalties and enforcement

(a) A person who knowingly violates, disobeys, omits, neglects, or refuses to comply with any of the provisions of this ordinance shall, upon conviction, be punished by a fine in an amount not less that $250.00 and not to exceed $500.00, or imprisonment, in the County Jail for a period not to exceed sixty (60) days, or both. Each day a violation is committed, or permitted to continue, shall constitute a separate offense and shall be penalized as such.

(b) The County's legal counsel is hereby authorized to institute civil proceedings necessary for the enforcement of this ordinance to prosecute, restrain, or correct violations hereof. Such proceedings, including suits for injunction, shall be brought in the name of the County, provided, however, that nothing in this section and no action taken hereunder shall be held to exclude such criminal or administrative proceedings as may be

authorized by other provisions of this ordinance or any of the laws or ordinances in force in the County or to exempt anyone violating this code or any part of said laws or ordinances from any penalty which may be incurred.

Sec. 3-65. Severability.

This ordinance and each section and provision thereof are hereby declared to be independent divisions and subdivisions and, not withstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provisions of said Article, or the application thereof to any person or circumstance is held to be invalid, the remaining sections or provisions and the application of such sections and provisions to any person or circumstances other than those to which it is held invalid, shall not be affected thereby, and it is hereby declared that such sections and provisions would have been passed independently of such section or provision so known to be invalid.

Section 2. Effective date.

This Ordinance shall become effective immediately upon filing with the Florida Department of State.

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No. 08-1033

In The
Supreme Court of the United States

5634 EAST HILLBOROUGH AVENUE, INC., *et al.*,
Petitioners,

v.

HILLSBOROUGH COUNTY, FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

Petitioners, six sexually oriented businesses, request this Court to review an unpublished, *per curiam* decision of the Eleventh Circuit affirming summary judgment for Respondent Hillsborough County, Florida (the "County") on Petitioners' challenge to three ordinances which regulate negative secondary effects associated with sexually oriented businesses.

The County has regulated sexually oriented businesses for several years. In response to the negative secondary effects of such businesses, changes in case law, and complaints of constituents, the County's Board of Commissioners (the "Board") began the process of updating and replacing its zoning, licensing, and alcohol ordinances in 2005. Over the next several months, the County compiled evidence concerning the negative secondary effects of sexually oriented businesses, investigated the regulations upheld by the courts to minimize those effects, and conducted public workshops to consider the evidence and develop appropriate legislation. As a result, three new ordinances were proposed and considered.

As the district court explained, "[t]wo public hearings were held before the Board prior to their adoption—one on August 2, 2006, and the other on August 16, 2006. Testimony was adduced both for and against the ordinances. The Board also reviewed judicial decisions, secondary effects reports, and affidavits from private investigators." (App. 11a-12a). Additionally, "[b]oth sides presented opinions from expert witnesses." (App. 13a). After the public hearings, the Board unanimously adopted the three

ordinances (the "ordinances") on September 7, 2006. (App. 7a).

Ordinance 06-24 eliminated a special zoning permit requirement for sexually oriented businesses, but did not change where they may be located. (App. 28a-29a). Ordinance 06-25 is a regulatory measure that requires licensing, but allows continued operation from the day of application until completion of judicial review of any adverse licensing decision. It regulates operating hours and "peep show" booth configuration, and forbids nudity and alcohol in sexually oriented businesses. Semi-nude employees (*i.e.*, those in pasties and a G-string) must be on a stage six feet from patrons in a room of at least 1000 square feet, and cannot have physical contact with patrons. (App. 30a-54a).[1] Ordinance 06-26 forbids bikini-clad employees in alcohol-serving "bikini bars" from touching patrons' buttocks, breasts, lap, and groin areas. (App. 55a-63a).

Each of the three ordinances describes its purpose within the body of the ordinance itself. In the cases of Ordinances 06-24 and 06-25, the ordinances explain that their purpose is "to promote the health, safety, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses in the County." (App. 7a, 29a,

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[1] Petitioners have omitted the text of these regulations from their Appendix, asserting at App. 53a that "[t]he excerpts deleted from this portion of the ordinance are not germane to the questions presented." On the contrary, the County's operational regulations targeting secondary effects are integral to Petitioners' constitutional challenge to the ordinances. Thus, Petitioners' omission of the substantive regulations is inexplicable.

34a). Ordinance 06-26 describes its purpose as "to promote the health, safety, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of paid physical contact in alcoholic beverage establishments between patrons and certain employees of the establishment." (App. 7a, 57a).

Within a week of the Board's adoption of the ordinances, the three Petitioners holding liquor licenses filed a lawsuit challenging Ordinance 06-26, the "bikini bar" physical-contact regulation. Approximately three months later, the remaining Petitioners filed a second lawsuit challenging Ordinance 06-24 (the sexually oriented business zoning ordinance) and Ordinance 06-25 (the sexually oriented business licensing and regulatory ordinance). The district court consolidated the two cases. (App. 6a).

At the close of discovery, the County moved for summary judgment. In opposition, Petitioners submitted four *new* expert affidavits which had never before been disclosed despite an expert disclosure deadline that had passed six months earlier. (App. 14a n.18). The County moved to strike the new expert affidavits on the ground that they had not been timely disclosed.

On October 4, 2007, the district court granted the County's motion for summary judgment. (App. 25a). The district court, "out of an abundance of caution," considered Petitioners' new expert affidavits. (App. 14a n.18, 24a). Finding that Petitioners had not created any genuine issue of material fact even with the late

affidavits, the court denied the County's motion to strike the late affidavits as moot. (App. 24a-25a).

In its opinion, the district court carefully reviewed the Ordinances' purpose, findings, and rationale. (App. 7a-11a, 20a-21a). It also summarized some of the key evidence in the undisputed legislative record—evidence demonstrating specific adverse secondary effects of sexually oriented businesses. (App. 11a-14a, 20a-24a). The district court observed that the legislative record contained numerous studies that reported crime and unsanitary conditions associated with sexually oriented businesses. (App. 12a n.13). After citing a number of specific studies included in the record, the district court also found that the record before the Board included "numerous additional studies, expert reports from other cases and testimony from other proceedings which predominantly support the fact that higher crime rates occur in areas where sexually oriented businesses exist." (App. 12a n. 13).

The district court further found that the County not only relied "upon an expert and studies used and approved by other courts, but retained investigators who actually visited similar or the same sexually oriented businesses as the Plaintiffs in this case and found evidence to support criminal conduct, the spread of communicable diseases, and other non-crime related adverse secondary effects." (App. 24a). In conjunction with its discussion of the record evidence, the district court also discussed controlling law from this Court and from the Eleventh Circuit. (App. 14a-20a). Applying that law to the record before it, the district court found that the ordinances do not ban sexually oriented businesses, but merely regulate the time, place, and manner of their operations. (App. 20a).

Finding that the ordinances were enacted to diminish adverse secondary effects, the court ruled that the ordinances were content neutral and subject to intermediate scrutiny. (App. 21a). Significantly, Petitioners did not contest these findings on appeal. (App. 2a).

After considering all of Petitioners' evidence, including their pre-adoption expert reports as well as the affidavits submitted for the first time in opposition to summary judgment, the district court held that the Board reasonably relied on the extensive evidence documenting the problem of adverse secondary effects. (App. 23a-24a). The court further found that Petitioners failed to cast direct doubt on the County's evidence or rationale for its ordinances. (App. 24a-25a).

At the Eleventh Circuit, Petitioners "abandoned on appeal numerous arguments that they either made or could have made in the district court and on appeal." (App. A, pp. 1a, 2a). Their "sole, and narrow, argument on appeal [was that they] adduced sufficient evidence to create genuine issues of fact with respect to whether the county satisfied its evidentiary burden to show that its ordinances have the purpose and effect of suppressing secondary effects." (App. 2a). "After oral argument and careful consideration," the Eleventh Circuit "conclude[d] that the County met its evidentiary burden to show that its ordinances have the purpose and effect of suppressing secondary effects." (App. 4a). The panel further "conclude[d] that appellants have pointed to no evidence that would create a genuine issue of fact as to whether the County was reasonable in relying on their evidence and their rationale that the ordinances would reduce secondary

effects." (App. 4a). Accordingly, the Eleventh Circuit affirmed the summary judgment entered in favor of the County. (App. 4a).

Petitioners' petition for rehearing and rehearing en banc was denied November 13, 2008. (App. 26a-27a).

REASONS FOR DENYING THE WRIT

The writ should be denied for several reasons. First, both the proposed questions and the petition as a whole are inaccurate, conclusory, and ambiguous. Among other defects, the petition never advises the Court of exactly what point of law should be reviewed or what Petitioners request the Court to do. This alone justifies denial of the writ. SUP. CT. R. 14.4.

Second, the petition should be denied because none of the reasons ordinarily justifying review is present. Under Supreme Court Rule 10, review is typically reserved for cases presenting important questions of federal law that are the subjects of circuit splits, that should be settled by this Court, or that have been resolved below in a manner contrary to this Court's relevant precedents. Despite Petitioners' unsupported statements to the contrary, none of these grounds is present in this case.

Third, the petition should be denied because there is no other compelling reason for review. Petitioners would have this Court believe that lower courts are clamoring for review of *City of Los Angeles v Alameda Books, Inc.*, 535 U.S. 425 (2002). However, a review of the cases cited by Petitioners reveals no such call; indeed, decisions under *Alameda Books* have reached consistent results. Petitioners are simply trying to

obtain review of a straightforward summary judgment decision. Petitioners' conclusory arguments against the ruling below consist, at best, of an alleged misapplication of a properly stated rule of law. This is not a basis for granting certiorari. *See* SUP. CT. R. 10.

I. THE PETITION SHOULD BE DENIED BECAUSE IT IS UNCLEAR.

Supreme Court Rule 14.1(a) requires a petition for a writ of certiorari to contain "[t]he questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail." Later in the same rule, petitioners are instructed to provide a "direct and concise argument amplifying the reasons relied on for allowance of the writ." SUP. CT. R. 14.1(h). "The failure of a petitioner to present with accuracy, brevity and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." SUP. CT. R. 14.4. The Court should deny the petition because it is conclusory, inaccurate, and seriously lacking in clarity.

The Petition presents three questions, but none identifies a particular point of law to be reviewed. Rather, the three roving questions seek review of the entire "opinion of the Eleventh Circuit below," "other judicial decisions throughout the Nation," an alleged "denial of due process," "confusion in the application" of an evidentiary burden-shifting process, and an undefined "differential summary judgment standard." Perhaps the confusion could be excused if the remainder of the petition illuminated the Petitioners' request, but the petition's subsequent argument does not bring the clarity that the questions presented lack.

In fact, the argument exacerbates this confusion by failing to address the three questions separately. The discussion of all three questions is scrambled together without any articulation of whether a particular argument refers to all three questions or just one.

The first question presented concedes that the Eleventh Circuit and "other courts throughout the Nation" have reached similar results in applying *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). Petitioners assert that these courts have misinterpreted *Alameda Books*, but Petitioners do not articulate how they have done so. Petitioners apparently request the Court to assume that conclusion, and hold that this undefined misapplication is a denial of due process—even though the decisions below never mention due process.

The second question is similarly unhelpful. Petitioners assume their conclusion—that confusion abounds in the lower courts—but even then, neither the question nor the subsequent argument articulates the exact point of law about which there is confusion. Nor do petitioners ask for *Alameda Books* to be overturned. Instead, Petitioners make a generalized request for review of a prior decision without articulating a concrete need for it.

The third question presented is the most convoluted of all three, mixing obtuse references to the summary judgment standard with First Amendment and due process labels. Again, the subsequent argument sheds no light on the subject.

The petition should be denied because it fails to present a clear and concise question for review.

II. THE PETITION SHOULD BE DENIED BECAUSE NO CIRCUMSTANCES JUSTIFY REVIEW.

A petition for a writ of certiorari will be granted only for compelling reasons, such as when a U.S. court of appeals has decided an important federal question (1) in a way that conflicts with the decision of another U.S. court of appeals or a state court of last resort, (2) that has not been, but should be, settled by this Court, or (3) that conflicts with relevant decisions of this Court. A petition is rarely granted when the asserted error consists of the misapplication of a properly stated rule. *See* SUP. CT. R. 10.

Petitioners assert that their petition "satisfies each of the factors identified in Rule 10 that guide this Court's decisions as to whether or not to grant certiorari review." Pet. 10. Of course, Petitioners' statement cannot be true because some factors addressed in Rule 10 apply only to appeals from state courts of highest resort. Even if this obvious misstatement may be excused, Petitioners' assertion demonstrates the carelessness with which Petitioners make completely unsupported assertions. In any event, a closer examination of each claim reveals that no Rule 10 factors are present.

A. There Is No Relevant Split of Authority in the Lower Courts.

Although not clear, it appears that Petitioners' primary argument is that a conflict or split of authority exists among the circuit courts of appeal. Petitioners do not identify any specific statement of law from one circuit that conflicts with a statement of

law from another circuit. Petitioners do quote from a couple of circuit court decisions and a handful of district court decisions, but they never demonstrate a conflict between the quoted language or any other part of the decisions. Instead, the petition relies upon conclusory statements that a conflict exists without ever specifically demonstrating the alleged conflict.

At pages 22 to 26, the petition quotes from six decisions purportedly "showing a split among virtually every level of the judiciary, and specifically among the federal circuit court." Pet. 22. Of those six quoted decisions, however, only two are circuit court decisions. The rest are U.S. district court decisions. Moreover, nothing in the quoted language (or other language within those decisions) reveals a split of authority.

Petitioners' circuit court quotations are from *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 294 (5th Cir. 2003), and *R.V.S., Inc. v. City of Rockford*, 361 F.3d 402, 408 (7th Cir. 2004). Nothing within the quoted portions of these decisions, however, reveals any conflict between them or with the decision of the Eleventh Circuit below.

Petitioners also cite a number of circuit court decisions from the Fifth, Seventh, Eighth, Ninth, and Tenth Circuits. Again, however, Petitioners completely fail to identify any specific conflict or split of authority between these decisions. Petitioners merely assert, without support, that these decisions "have essentially ignored the presentation of unassailable evidence casting doubt upon the findings upon which various adult restrictions have been based . . . ." Pet. 21. Significantly, Petitioners do not attack any purported holding or rule of law articulated by any of these

decisions, but instead simply express disagreement with the conclusion that these courts reached as they applied the law. Petitioners' quarrel boils down to Petitioners having a different view of the strength of evidence marshaled by a number of other sexually oriented businesses who challenged ordinances in a variety of other cases. This, however, is a far cry from demonstrating a conflict or split of authority among the circuits.

Petitioners also allege that the Eleventh Circuit decided a significant question of federal law in a manner contrary to decisions of state appellate courts. Pet. 10. Allegedly, the unspecified issues at hand "have both confused and tortured courts at every level of state and federal judiciaries." Pet. 9. At yet another point, the petition references a supposed "monumental conflict between the Federal Circuit Courts in their application of *Alameda Books*, and its state and Federal progeny . . . ." Pet. 17.

Despite this bombastic rhetoric about a conflict with state court decisions, there is not a single quotation from a state court of last resort in the entire petition. Likewise, the petition does not discuss the substance or holdings of any state court of last resort. Instead, the only references to state courts of last resort in the entire petition are three citations in a string citation in a footnote. Pet. 18 n.4. Again, the petition does not identify any supposed conflict between the decision below and any of these decisions.

Nor does this case involve an important, unsettled question of federal law. Although Petitioners imply that the holding in *Alameda Books* is unclear (leading to widespread, albeit *uniform*, misinterpretation of the

case), the lower court decisions belie this claim. In discerning the holding of *Alameda Books*, the lower courts have consistently applied this Court's rule that when no single opinion commands a majority of the Court, the holding is that opinion that concurs in the judgment on the narrowest grounds. *See, e.g., Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860, 875 n.20 (11th Cir. 2007) (following *Marks v. United States*, 430 U.S. 188, 193 (1977), to conclude that Justice Kennedy's concurrence constitutes the holding of *Alameda Books*); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 862 n.1 (8th Cir. 2003) (same); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 722 (7th Cir. 2003) (same). Thus, Petitioners fail to identify any important question of federal law implicated by the Eleventh Circuit's decision that has been left unsettled by this Court.

Petitioners also assert that "[t]he decision of the 11th Circuit . . . is in direct and irreconcilable conflict with decisions of this Court." Pet. 10. As with their other claims, Petitioners never identify a specific alleged conflict. Instead, Petitioners state that "the rejection of 'the rules of evidence' in adult entertainment cases is in direct conflict with this Court's decision in *City of Los Angeles v. Alameda Books*," and that

> The 11th Circuit, in affirming the grant of summary judgment issued by the District Court, incorrectly overlooked this Court's precedent and Eleventh Circuit precedent which allows a full and fair opportunity to evaluate conflicting evidence, in an appropriate evidentiary hearing, relative to the hypothesis

> that adult entertainment businesses create "adverse secondary effects."

Pet. 12.

From these two statements, it appears that Petitioners contend that the "conflict" between the Eleventh Circuit decision and this Court's precedents is that the Eleventh Circuit "rejected the rules of evidence" and refused to allow "an appropriate evidentiary hearing." Petitioners go on to accuse the Eleventh Circuit, through its granting of summary judgment, of "simply ignor[ing] the vast evidence submitted to 'cast doubt' on the County's evidence, and erroneously ignored the challenge to the core methodology, applicability, and quality of the County's evidence." Pet. 14. Petitioners essentially assert that summary judgment is never appropriate in a constitutional case challenging the legislative predicate for regulations. There is no support for this view in this Court's sexually oriented business cases or in any other area of law. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (holding adult business zoning ordinance constitutional as a matter of law); *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 211 (1997) (rejecting First Amendment challenge and noting that where government has made its required showing, summary judgment is appropriate "regardless of whether the evidence is in conflict").

Petitioners never identify a statement of law from the Eleventh Circuit which conflicts with a statement of law from *Alameda Books* or any other decision from this Court. Instead, Petitioners claim that the Eleventh Circuit erred in granting summary judgment

for reasons Petitioners do not specifically identify. Even if this were true, it would not be a basis for the Court to grant certiorari. SUP. CT. R. 10.

B. There Are No Other Compelling Circumstances Justifying Review.

The second question presented for review is predicated on Petitioners' assertion that several lower court decisions have made "impassioned pleas for this Court to address the inconsistencies and confusion exhibited by the several attempts to apply the *Alameda Books* decision consistently . . . ." Pet. 18 n.4. This claim is false.

Supreme Court Rule 15.2 states that "[c]ounsel are admonished that they have an obligation to the Court to point out . . . perceived misstatements made in the petition." Here, Petitioners' claim of alleged "impassioned pleas" from the lower courts is a misstatement. Petitioners attempt to support the misstatement by citing a dozen lower court decisions, but not a single one of them complains about confusion stemming from *Alameda Books* or entails any "impassioned plea" to address such alleged confusion. Indeed, some of the cited cases were handed down *before Alameda Books* was even decided. *See* Pet. 18 n.4 (citing *Deja Vu of Nashville, Inc. v. Metropolitan Gov. of Nashville and Davidson County, Tenn.*, 274 F.3d 377 (6th Cir. 2001), *cert. den.*, 122 S.Ct. 1952 (2002), and *Kismet Investors, Inc. v. County of Benton*, 617 N.W.2d 85 (Minn. App. 2000), *cert. den.*, 122 S.Ct. 2356 (2002)). Additionally, *none* of these decisions complain about supposed inconsistencies or confusion arising from *Alameda Books*. Tellingly, Petitioners do

not provide a pinpoint citation for any of the twelve cases to support their argument.

In an attempt to obtain review by this Court, the petition consistently mixes lofty rhetoric and key concepts such as splits of authority and conflicts with decisions of this Court. In the final analysis, however, Petitioners never identify a specific statement of law which is allegedly incorrect. Likewise, Petitioners never identify a specific statement of law from one case which conflicts with a rule announced in another case. The claims of confusion and conflict are supported by nothing more than the fact that sexually oriented businesses are sometimes successful and sometimes unsuccessful at summary judgment or at trial. Different results in different cases, however, do not suggest confusion or conflicting views of governing law. Rather, they suggest that courts are properly applying the law to the evidence before them.

That is what the district court and the Eleventh Circuit did in the present case in granting (and affirming) the County's motion for summary judgment. Where, as here, the only "asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," the petition for a writ of certiorari should be denied. SUP. CT. R. 10.

CONCLUSION

No factors are present which justify granting the petition. This case does not involve any split of authority between the Eleventh Circuit and another court of appeals or a state court of last resort. Neither does the Eleventh Circuit's decision involve a conflict with an opinion of this Court or an issue of law left

unresolved by this Court. To the contrary, the case involves a straightforward application of governing law to undisputed facts. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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